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Supreme Court of the United States

OCTOBER TERM, 1944

No. [redacted] 121

MANHATTAN LIGHTERAGE CORPORATION,
Petitioner,

against

ERNEST ANDERSON, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No.

MANHATTAN LIGHTERAGE CORPORATION,
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against

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Manhattan Lighterage Corporation, a New York corporation, prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its order entered April 23, 1945 (R. Vol. B, pp. I-VII),* reversing judgments of the United States District Court for the Southern District of New York, entered September 21, 1944, dismissing respondents' com-

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* References are: D. A.—Defendant's Appendix; R.—Transcript of Record.

plaints herein (R. Vol. A, pp. 28-31). A certified transcript of the record in this case, including the proceedings in the said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, paragraph 1 of the Rules of this Court.

Statement

This case involves construction of the word "seaman" as used in Section 13 (a) (3) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 1067; 29 U. S. C. Secs. 201, 213) defining one of the classes of employees exempt from the provisions of said Act. The text of this exemption is as follows:

> "The provisions of Sections 6 and 7 shall not apply with respect to * * * (3) any employee employed as a seaman * * *."

This suit is for overtime compensation plus an additional equal amount as liquidated damages. Respondents' claims comprise all of the causes of action against petitioner in two suits in the District Court against petitioner and sixteen other corporations or companies; these claims were severed and the severed causes consolidated for separate trial. On motions for summary judgment by petitioner under Rule 56 of the Federal Rules of Civil Procedure, the District Court granted petitioner's motions and dismissed the complaints with opinion to effect that as respondents' own testimony and affidavits established that they are employed on vessels in commerce in navigable waters, as they have a degree of permanency in their connection with the vessels characteristic of ships and crews, as they are subject at least in a measure to the risks of sea-

men, as they are bound to the vessel on long trips out of the harbor as required, as they are entitled to maritime liens as security for wages; and as "the primary duty of each of the plaintiffs was the care, inspection and maintenance of the vessel", that they are seamen and excluded from coverage by the Section 13 (a) (3) exemption.

The Circuit Court of Appeals, disregarding settled law on the meaning of "seaman" generally, and in particular judicial interpretation of that word as used in the Fair Labor Standards Act, and overlooking the broad purposes of the bill's enactment as outlined by President Roosevelt in his address urging passage of this legislation, reversed the District Court and remanded the causes for what must be, unless this petition is granted, lengthy, costly and unnecessary trials. Petitioner's petition for rehearing was denied (R. Vol. B, p. XV).

Facts

Petitioner made its motions for summary judgment in the District Court relying upon examinations of respondents as adverse witnesses before trial. Petitioner's theory was and is that respondents' own testimony shows conclusively that they are seamen and, therefore, not covered by the Fair Labor Standards Act. The facts appearing in the record, including a short formal affidavit by petitioner's President (as to the facts of which there is no dispute) and in the depositions and affidavits of respondents are summarized as follows:

Petitioner is in the business of lightering cargo between ships, to and from ships and docks, and from points between docks in greater New York harbor and in the rivers

and harbors contiguous thereto and elsewhere (D. A. 19, 20, 22, 29, 63, 66, 97, 125). In this business it operates numerous self-propelled vessels including tugs and steam lighters (R. Vol. A, p. 21).

For the purposes of this petition and the appeal, petitioner concedes that respondents employed on its barges or lighters were at all material times engaged in interstate commerce within the meaning of the Fair Labor Standards Act (52 Stat. 1062, 1063, 29 U. S. C. Secs. 206, 207).

Respondents were employed on four different types of vessels, namely, covered barges, gasoline-hoist lighters, tank barges, and gasoline-hoist lighters not rigged for hoisting. All of these craft are non-self-propelled, except that the gasoline-hoist lighters are moved short distances by attaching a rope to the point toward which the lighter is to be moved and winding up the rope on the power-driven windlass of the lighter (infra, p. 10), and the covered barges are moved short distances by hand when the captain winds up a rope on the barge's capstan (infra, p. 10).

Although the present operations, due to existing abnormal conditions, involve transportation of general cargo principally within the harbor of greater New York (D. A. 20, 29, 66, 125), these operations are not strictly so confined and have extended to points as far north as Troy and Green Island, and tank barges carry bulk cargo to Peekskill, N. Y., Guttenberg, N. J., and Kearny, N. J. (D. A. 19, 20, 22, 63, 97). It is a part of respondents' duties to accompany the barges or lighters as required to such other points as may be determined by the requirements of petitioner's contracts of affreightment (D. A. 32, 33, 65, 66).

All of these craft have Custom House numbers and Consolidated Certificates of Enrollment and License issued by the Department of Commerce and approved by the Surveyor of Customs authorizing them to participate in the coasting trade (D. A. 38, 53, 54, 78, 94; R. Vol. A, p. 21). The lighters or barges have flat decks upon which cargo is loaded and hatchways leading into holds where spare ropes and tackle are kept (D. A. 10, 78, 80, 81). They have cabins furnished with bunks, tables and some cooking facilities which are available for use by the lighter catains (D. A. 8, 9, 13, 19, 21, 32, 44, 54, 68, 69, 82, 83, 105, 106, 117) and are occasionally used (D. A. 8, 9, 19, 21, 65, 83, 105).

Generally speaking, a lighter captain neither sleeps on nor takes his suppers aboard the barge, but is prepared to do so when his presence is required (D. A. 33-34, 106). The cooking facilities are used to prepare coffee and sometimes potatoes, soup and the like (D. A. 13, 19, 21, 32, 83, 105, 117). During the long tows above referred to or when towing at night, the captain sleeps on board (D. A. 33, 34, 46).

They often work many hours in excess of eight hours in a single day, for which, pursuant to collective bargaining agreement, they receive compensation at the rate of time and a half (D. A. 48, 106, 117, 118).

The covered barges have a housed-in portion above the deck and the cabin is either on top of this covered portion, sometimes called the freight house, or on the stern. The barges are equippd with two bilge pumps which are hand-operated, one at the bow and one at the stern, serving the port and starboard corners, depending upon the vessel's trim (D. A. 2, 11, 28, 60, 61, 100). Some of the barges are equipped with portable gasoline-pumps to supplement

the hand operated pumps in emergencies (D. A. 8, 90, 91, 102, 103). They usually have four hatchways, two at the bow and two at the stern on the port and starboard sides of the center bulkhead (D. A. 115).

The gasoline-hoist lighters have masts and booms used for loading cargo. They are equipped with tarpaulins used to cover and protect cargo (D. A. 8, 114). These lighters, as well as tank barges, usually have two pumps of the same type as those on covered barges and in addition have gasoline-powered pumps with suction leads to the bow and stern corners across from the hand-operated pumps (D. A. 2, 42, 43) and, like the covered barges, may also have portable gasoline pumps (D. A. 8).

Respondents are entitled to free treatment at United States Marine Hospitals (D. A. 112) and may obtain naturalization under the Seamen's Act (D. A. 58). They are entitled to wages, maintenance and cure, maritime liens as security for wages and they may sue under the Jones Act (*infra*, pp. 22, 23).

They are subject to perils and accidents of the sea, as when the lighter *Orange* broke away from her stakeboat in a storm (D. A. 57, 58), or when the *Biltmore* went down at Pier 32, North River, after she sprang a leak and the "water came in like a river" (D. A. 118), or when the *Manhattan 50* collided with canal fenders near Troy (D. A. 63-65), or when Lars Carlsen was awakened from his sleep by water flooding his cabin when the *Palm* sank at Guttenberg, N. J. (D. A. 22), or when Olaf Knudsen's lighter went down under him when under tow off Staten Island (D. A. 28, 29), or when the *Paramount* caught fire when loading at Spencer Kellogg's (D. A. 78, 79).

Duties of Captains

Respondents working on barges having hoisting apparatus are responsible for the condition of the engine (D. A. 50, 51). They attend to refueling, oiling and routine maintenance by using tools supplied for that purpose (D. A. 3, 4, 24, 25, 45, 46, 50, 71, 75, 76, 84, 113, 120), and in cold weather, they drain off water so that the cylinder blocks will not crack (D. A. 25, 76, 84, 88, 113) or put antifreeze into the engine (D. A. 120). They heat up water on the crafts' stoves to help start the engine in cold weather (D. A. 54), or run the stove to protect the engine from freezing (D. A. 84). When the engine requires repairs, they report this condition to petitioner (D. A. 45, 51, 88, 113, 120). When cargo is loaded or unloaded these respondents, and, contrary to the opinion of the Circuit Court of Appeals (R. Vol. B, p. III), only these respondents, operate the engine which powers the cargo hoists (D. A. 45, 112, 113) and in this respect they characterize themselves as engineers (D. A. 75). They are sometimes called upon to steer the lighter when towing at night (D. A. 48).

Except when the lighter is under charter, the duties of a captain, irrespective of whether employed on a covered barge or a gasoline-hoist lighter, include tallying cargo and receipting therefor when tendered (D. A. 14, 36, 47, 56, 57, 74), noting by exceptions the condition of cargo on delivery, at the same time keeping a record of all shortages and apparent damage (D. A. 112, 113, 124). These duties may take the captain onto the pier (D. A. 123). He may deliver cargo manifests or tallies to steamship companies' receiving clerks (D. A. 53, 56, 57).

All of a lighter captain's duties are "in conjunction with a lighter" (D. A. 123), and he performs his duties over a

period of years on a particular lighter (D. A. 38, 49, 50, 62, 73, 74, 80, 86, 90, 94, 103, 109, 115), except in the case of a relief captain (D. A. 23). It is not uncommon that when a lighter is purchased by petitioner, the lighter captain will stay with his boat and come into the employ of petitioner with the lighter (D. A. 50, 68, 80).

The primary duties of respondents require their presence on board the lighters (D. A. 3, 5, 47, 53, 57-59, 70, 79, 83-85, 101, 102, 106, 109) and all of their duties contribute to the welfare and operation of the vessels (D. A. 3-6, 17, 20, 25, 27-31, 47, 48, 56-59, 70-72, 79, 85, 86, 87, 110-112).

Respondents are authorized, in the absence of performance of that function by runners or by the lighter foreman, to hire necessary labor to load and unload cargo (D. A. 14, 112, 123), and to direct and supervise loading and stowage (D. A. 13, 63, 71, 72, 112), which is primarily work on the lighter (D. A. 47, 106, 107). They may hire a mate to assist in loading and unloading cargo (D. A. 46-49).

Supervision of loading and stowage takes into account the requirements of seaworthiness (D. A. 41, 42, 72, 79), trimming cargo to the pumps (D. A. 11, 42, 43, 61, 90), and directions to the loading crew not to load the lighter beyond her freeboard limitations (D. A. 11, 47, 79, 109, 110), and otherwise to take measures to secure the safety and seaworthiness of the lighters (D. A. 87, 101, 102, 109-112).

On occasions where through labor shortages, it is impossible for petitioner's foreman, runners or respondents themselves to obtain adequate crews to handle cargo, the captains may themselves assist in loading and unloading (D. A. 14, 63, 92), but while loading they are limited to work on board their own lighters (D. A. 106, 107). This

participation is exceptional and is work for which the captains are paid additional compensation (D. A. 14). Respondents in their affidavits submitted in opposition to the motions for summary judgment claimed that work of this kind took up about 95% of their working time (D. A. 123, 124), except that work of comparable character performed by respondent Lars Carlsen, a tank bargee, is said to have consumed about 90% of his working time.

The captains notify petitioner when a barge or lighter is light and when loaded and ready to tow (D. A. 91). They are always on board when towing during the day (D. A. 91, 98, 114), and may be on board when towing at night (D. A. 48, 114, 121, 122). While under tow they may act as lookouts (D. A. 85).

The lighter captain is in full charge of his vessel (D. A. 72, 106) and inspects the same and her equipment from time to time (D. A. 7, 11, 17, 18, 24, 25, 31, 32, 41, 43, 44, 52, 56, 70, 87, 95-97) and reports to petitioner (D. A. 27, 31, 32, 41, 42, 56, 70, 78, 79, 89, 96, 101).

When necessary the captain pumps water from the hold (D. A. 2, 3, 13, 14, 18, 24, 28, 42-44, 61, 62, 73, 81, 82, 95, 99, 101, 110) and reports any defective condition of the pumps to petitioner (D. A. 4, 99). He is charged with the responsibility of proper securing of lines (D. A. 5, 6, 97, 103) and takes a hawser from the tug and places the eye of the hawser over the towing bitt on the lighter (D. A. 9, 26, 47, 48, 73, 82, 97, 98, 102, 113).

The captain directs the tug to place the lighter in a proper berth (D. A. 26, 93, 103, 104). He has a knowledge of tides (D. A. 5, 12, 21, 29, 76, 77, 97, 103, 104, 121), and uses the tides to assist in shifting the lighter from an unsafe to a safe berth (D. A. 121).

When the lighter has been improperly berthed, the lighter captain notifies petitioner, or requests the tug captain to move her to a safe berth (D. A. 70).

He also moves the lighter by operating a capstan or winch (D. A. 9, 30, 51, 52, 70, 77-78, 87, 121) or hires a crew to shift the lighter either to take on cargo (D. A. 52), or to obtain a safer berth (D. A. 30, 121).

If a leak is detected in the hold by the captain he caulks leaky seams with oakum, cloth, wood or wire (D. A. 7, 11, 13, 25, 62, 63, 96, 104) or reports the leakage to petitioner (D. A. 31, 42, 69, 70). He knows when it is safe and when it is dangerous to attempt to caulk a seam from within the hull (D. A. 104, 105). When leakage becomes so serious as to render ineffective the barge's pumping equipment he summons a tug to assist in pumping (D. A. 6, 28, 44, 62, 82, 92, 93, 96, 101, 102, 111) and he may help the tug's crew to place the siphon (D. A. 62, 102).

When cargo is loaded he is responsible for the barge's trim in matters pertaining to seaworthiness (D. A. 3, 79, 92, 95), and in particular he sees that the cargo is trimmed to that corner of the bow or stern equipped with a bilge pump so that the pump may be operated by him with maximum efficiency (D. A. 2, 3, 11, 42, 43, 56, 61, 90, 95, 100).

He handles lines (D. A. 5, 6, 9, 12, 20, 21, 26, 29, 56, 64, 65, 70, 71, 88, 89, 103, 116, 117), and at piers sees to it that the spring and breast lines have sufficient lead to compensate for the rise and fall of the tide (D. A. 5, 12, 21, 29, 70, 71, 76, 77, 89, 97, 111). He may put wooden scantlings or fenders along the side of the lighter to protect her when bumping against ships or piers (D. A. 25, 37, 66, 67).

Before cargo is loaded or discharged the captain supervises or assists in securing the barge to the dock-side by

the use of breast lines (D. A. 97-98). He keeps a daily record of loading and discharging of cargo which is delivered to petitioner each week; the captain calls this record a log (D. A. 93). He takes whatever measures are at hand to prevent damage to the lighter by approaching craft (D. A. 35, 36).

He splices lines (D. A. 4, 5, 72, 98), splices eyes on hawsers (D. A. 5, 72, 113). He drives nails into loose planks (D. A. 99) and secures the skid for working cargo (D. A. 51).

He may put out navigation lights either while in tow or before leaving the lighter at night (D. A. 20, 34, 35, 83, 121, 122). It is his responsibility when towing at night to see that the lights are properly placed (D. A. 34, 35, 83). In order to properly handle lights he may receive instructions from petitioner (D. A. 83).

When the lighter is under charter, respondents report to charterer on matters pertaining to cargo and to petitioner on matters pertaining to the condition of the lighter (D. A. 36, 52, 53, 75, 84, 85, 93, 94), and when under charter, respondents have no duties in connection with loading and unloading cargo, or receipting for or tallying cargo (D. A. 36, 119).

Conflict of Circuits

Since June, 1938, until April 16, 1945, when the Circuit Court of Appeals handed down its opinion in this case, there had been no doubt in the minds of those operating vessels as a part of marine transportation that their employees whose duties were all "in conjunction with" these vessels were seamen and not covered by the Fair Labor Standards Act.

In the Senate discussion of the bill, its sponsor, Senator Hugo Black, now Associate Justice of this Court, stated that the bill was so drawn as to exclude "maritime workers" from coverage.*

The legislative history fully considered gave impetus to this construction, and by express invitation of responsible representatives of the important maritime unions, wage and hour conditions in the maritime industry were improved for labor through collective bargaining agreements so that now the only material discrepancy between conditions under which respondents are engaged and standardized conditions under the Act is that the effective wage and hour schedules have by collective bargaining been adapted to the unusual conditions of marine transportation.

Petitioner's construction of this statute received firm support in *Gale* v. *Union Bag & Paper Corporation,* 116 F. (2d) 27 (C. C. A. 5), cert. den. 313 U. S. 559 (1940). In that case, plaintiffs brought an action to recover overtime wages and liquidated damages under Sections 6 and 7 of the Fair Labor Standards Act. They were employed as barge tenders on defendant's fleet of barges which were non-self-propelled and were used to carry raw materials to defendant's plant at Savannah from points in Georgia, South Carolina and Florida. Plaintiffs performed duties usual to their occupation as they attended to lines, put out running and mooring lights and pumped out bilge water. They were furnished sleeping quarters which were available for their use and which they did use when the barges were under tow.

As appears from the District Court's findings of fact in *Lowrimoore* v. *Union Bag & Paper Corporation,* 30 F.

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* 81 Congressional Record 7875.

Supp. 647, 649, while the barges were at Savannah, plaintiffs cared for them, pumping out bilge water, but they did not eat on the barges and were free to go home. When several barges were at Savannah at one time, all of the duties were performed by a single barge tender and all the other bargees stayed at home. When a stage of the towage was completed, the tugs would leave the barges to be loaded by contractors.*

But the plaintiffs, as here, would see to it that the barges were "loaded evenly and not too near the edge" and while in tow plaintiffs, unlike respondents here, had no duties whatever with respect to navigation. When moored plaintiffs secured the lines or assisted in securing them and left sufficient slack to compensate for the rise and fall of the tide. The Circuit Court of Appeals held that these employees were seamen, saying:

> "The word 'seaman' has a plain, ordinary meaning universally applied. Whether a person is a seaman depends upon the character of his duties. If they are maritime in character and rendered on a vessel in commerce, in navigable waters, he is a seaman" (27-28).

There cannot be the slightest doubt that whether respondent's duties are regarded as in connection with the protection of the vessel or in connection with cargo, they

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* This compares to the situation when petitioner's lighters are under charter.

"Q. When you are under charter to the New York Central and Pennsylvania Railroad do you hire crews then? A. No.

Q. You never hire crews under charter? A. No" (Knudsen, D. A.).

* * * * * *

"Q. To whom were you responsible during that time for cargo? A. I could not tell you because they loaded the boats at night and we did not sign for anything on the railroads.

Q. In other words, when under charter you did no loading or unloading? A. No, sir" (Peterson, D. A. 119).

are "maritime in character" and rendered on a vessel in commerce in navigable waters. It is clear that the rule of law determining status as applied in the *Gale* case, which this Court declined to review, cannot be of any continued force and effect if the opinion of the Circuit Court of Appeals that the exemption applies only to seamen on ocean going vessels except as limited by administrative interpretation is upheld.

The Court recognized that respondents were "members of the crew" as that term is used in the Social Security Act (R. Vol. B, p. V). The Circuit Court of Appeals for the Seventh Circuit in *Walling* v. *Great Lakes Dredge & Dock Company,* ..... F. (2d) ..... (decided April 24, 1945) held that employees on dredges are not seamen within the Section 13 (a) (3) exemption because they were not members of the crew within the meaning of *South Chicago Co.* v. *Bassett,* 309 U. S. 251. We therefore have the unusual situation where two Circuit Courts, both disregarding the decision in the *Gale* case, have held (a) that a member of a crew is not a seaman and (b) an employee is not a seaman because not a member of the crew.

It is submitted that only by granting this petition may this conflict be resolved.

The Circuit Court of Appeals Failed to Give Full Effect to the Opinion of This Court in *Norton* v. *Warner Co.*

In *Norton* v. *Warner Co.,* 321 U. S. 565, the plaintiff was employed as a barge captain on a vessel having no motive power of her own but, as in the case at bar, was capable of being moved short distances by winding up a cable by hand-

operated capstan. There, as here, the barge was a documented vessel of the United States and there her operations were strictly confined within a radius of thirty miles of the Port of Philadelphia. Plaintiff lived on board the barge and was paid an hourly wage, as well as a monthly salary. All of his experience as a seaman was obtained as a bargee. His duties consisted of taking care of the barge generally, tightening or slackening the lines when necessary. He took lines from tugs, pumped bilge water, put out navigation lights, took orders from the tug boat while under tow and moved the barge short distances by operating the capstan.

The Deputy Commissioner assumed jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1924, 33 U. S. C. Sec. 901) and his award was upheld by the District Court (45 F. Supp. 835). The Circuit Court of Appeals for the Third Circuit reversed (137 F. (2d) 57). This Court affirmed the Circuit Court of Appeals holding that plaintiff's duties were essential for the purposes of the vessel and that plaintiff "moreover had that permanent attachment to the vessel which commonly characterizes a crew" (757).

The record shows that respondents have far more of a permanent attachment to their craft than is shown by the record in the *Warner* case, viz.: they had in several instances remained with their craft even when purchased by another company (D. A. 50, 68, 80), and although the petitioner owns many vessels of more or less the same type, it is the usual case where each lighter captain remains on one lighter for a great many years (D. A. 38, 49, 50, 62, 73, 74, 80, 86, 90, 94, 103, 119, 115). It cannot be contended that any of respondent's duties were other than essential

to the purposes of their vessels within the meaning of the *Warner* decision. True it is that the record in the *Warner* case does not indicate that plaintiff Rusin loaded or unloaded cargo, but in deciding that he was a member of the crew, this Court at page 572 of its opinion relied upon *Disbrow* v. *Walsh Bros.*, 36 F. 607 (S. D. N. Y.), holding that bargees were seamen notwithstanding that "The chief part of their work was loading and unloading the cargo" (608).

Apparently the Circuit Court also overlooked the footnote to this Court's decision in the *Warner* case wherein the Court said:

> "'Seamen' as used in a particular context may of course have a broader meaning than 'crew'. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50. And see *Carumbo* v. *Cape Cod S.S. Co.*, 123 F. 2d 991" (572).

We submit that in considering the conflict of circuits, this Court may well consider whether proper effect has been given to its decision in the *Warner* case so as to justify issuance of a writ of certiorari.

Jurisdiction to Review

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a) as amended by Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. Sec. 347 (a)). The date of the order of the Circuit Court of Appeals for the Second Circuit to be reviewed is April 23, 1945.

Question Presented

1. The question as to the meaning of the Section 13(a)(3) exemption.

Whether the Court is justified in limiting the meaning of an exemption even though from a remedial statute where the meaning of exemption phraseology has by long-established precedent repeatedly enunciated acquired a meaning rendering interpretation unnecessary, and by so doing cast upon an industry years of accumulated overtime pay and penalties.

Reasons Relied On for Allowance of the Writ

1. The Circuit Court of Appeals in determining the non-exempt status of respondents, has applied a rule of law in conflict with prior construction of the same exemption by the Fifth Circuit.

2. The granting of a writ of certiorari will bring before this Court a question of interpretation of an exemption provision in an important Federal statute which has never before been considered by it except by denial of a writ of certiorari.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit at New York, New York, requiring said Court to certify and send up to this Court on a date to be designated a full and complete transcript of the record and

of all proceedings in the Circuit Court of Appeals had in this action to the end that this action may be reviewed and determined by this Court; and the order of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

MANHATTAN LIGHTERAGE CORPORATION,
By CHAUNCEY I. CLARK,
HERBERT M. LORD,
Counsel for Petitioner.

New York, N. Y.,
June 6, 1945.

Supreme Court of the United States

OCTOBER TERM, 1944

MANHATTAN LIGHTERAGE CORPORATION,

Petitioner,

against

ERNEST ANDERSON, et al.,

Respondents.

BRIEF IN SUPPORT OF THE PETITION

The opinion of the District Court (R. pp. 23-27) has been reported at 57 F. Supp. 218, *sub. nom., Arnesen, et al.* v. *Manhattan Lighterage Corporation, Johnson, et al.* v. *same.* The opinion of the Circuit Court of Appeals (R. Vol. B, pp. I-VII) has been reported at ..... F. (2d) .....

POINT I

Respondents are seamen—their duties are maritime in character and are rendered primarily on vessels in commerce in navigable waters.

As appears from the undisputed allegation of paragraph Fifth of the complaint, the craft upon which respondents are employed are vessels (R. Vol. A, p. 5), and these vessels are documented (*supra*, p. 5).

"Seaman" is a term of broadest import. "The word 'seaman' has a plain, ordinary, meaning universally applied. Whether a person is a seaman depends upon the character of his duties. If they are maritime in character and rendered on a vessel in commerce in navigable waters, he is a seaman." *Gale* v. *Union Bag & Paper Corporation,* 116 F. (2d) 27 (C. C. A. 5), cert. den. 313 U. S. 559.

The statutes with exemption provisions comparable to that in the Fair Labor Standards Act have contained slightly varying descriptions of the particular class of maritime employees excluded from coverage. Under the Longshoremen's and Harbor Workers' Compensation Act of 1927, and the Social Security Act, exemption is based upon the term "member of a crew". Coverage of the Merchant Marine Act depends upon whether or not the particular employee is a "seaman", which term defines the limitations of the Fair Labor Standards Act. Of the two exemptions, the courts have held that "seaman" is the more comprehensive. *DeWald* v. *Baltimore & O. R. Co.,* 71 F. (2d) 810, 813 (C. C. A. 4); *Nogueira* v. *New York, New Haven & Hartford Railroad Co.,* 281 U. S. 128; *Carumbo* v. *Cape Cod S.S. Co.,* 123 F. (2d) 991; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50.

In *Ellis* v. *United States,* 206 U. S. 246, a statute related "to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia", and did not expressly exclude seamen. This Court (Holmes, J.) held that employees on scows and floating dredges were seamen, not "laborers and mechanics" and, therefore, exempt from the eight hours' limitation, saying:

> "But the argument does not stop with masters of tugs, or even with mates, engineers and firemen of the

same. *Wilson* v. *The Ohio,* Gilpin, 505; *Holt* v. *Cummings,* 102 Pa. St. 212. The scows and floating dredges were vessels. Rev. Stat. §§ 3, 4612. They were within the admiralty jurisdiction of the United States. *The Robert W. Parsons,* 191 U. S. 17. (A number of cases as to dredges in the Circuit and District Courts are referred to in *Brown Hydraulic Dredging Co.* v. *Federal Contracting Co.,* 148 Fed. Rep. 290.) Therefore all of the hands mentioned in the informations were seamen within the definition in an earlier statute of the United States. Rev. Stat. § 4612; *Saylor* v. *Taylor,* 77 Fed. Rep. 476, S. C. 23 C. C. A. 343. See also Act of March 3, 1875, c. 156, § 3; 18 Stat. 485; *Bean* v. *Stupart,* 1 Dougl. 11; *Disbrow* v. *The Walsh Brothers,* 36 Fed. Rep. 607. They all require something of the training and are liable to be called upon for more or less of the services required of ordinary seamen. The reasons which exclude the latter from the statute apply, although perhaps in a lesser degree, to them. Whatever the nature of their work it is incident to their employment on the dredges and scows as in the case of an engineer or coal shoveller on board ship" (259-60).

The term "seaman" or "master or member of a crew" has been held to embrace, among others, the following employees: A cook (*Allen* v. *Hallett,* 1 Fed. Cas., p. 472); a fireman (*The North America,* 18 Fed. Cas., p. 339); a fireman on a lighter (*Cassaretakis' Case,* 289 N. Y. 119); an employee on a dredge (*Saylor* v. *Taylor,* 77 Fed. 476, C. C. A. 4); a wireless operator (*The Buena Ventura,* 243 Fed. 797, 2nd case); a carpenter (*Kuhlman* v. *W. & A. Fletcher Co.,* 20 F. (2d) 465); (*Rogosich* v. *Union Dry Dock & Repair Co.,* 67 F. (2d) 377); a horseman* (*United States* v. *Atlantic Transport Co.,* 188 Fed. 42); a deckhand and a diver on a scow (*De Gaetano* v. *Merritt & Chapman Derrick & W. Co.,* 203 App. Div. 259); a watchman (*Grimberg* v. *Oriental S.S. Line,* 300 Fed. 619); a pilot (*The Mary*

* Employed on ship to care for horses carried on the voyage.

Elizabeth, 24 Fed. 397); a cooper (*United States* v. *Thompson,* 28 Fed. Cas., p. 102); a hand on a river boat (*Martin* v. *Acker,* 16 Fed. Cas., p. 884); a surgeon, porter and chambermaid (*Meyer* v. *Dollar S.S. Line,* 43 F. (2d) 425); an employee on a derrick-hoist (*The Sallie,* 167 Fed. 880); an engineer on an unregistered motor boat (*The Virginia Belle,* 204 Fed. 692); a barge captain on a non-self-propelled barge (*Norton* v. *Warner Co.,* 321 U. S. 565); lighter captains on non-self-propelled lighters (*United States Lighterage Co.* v. *Jane M. Hoey,* 142 F. (2d) 484, C. C. A. 2); a caretaker on a barge (*Tucker* v. *Norton,* 56 F. Supp. 61).

The following have been held seaman and entitled to a lien against the vessel for wages:

An orchestra owner on an excursion scow (*The Sea Lark,* 14 F. (2d) 201; W. D. Wash.); a bargee engaged to load and unload a brick barge (*Disbrow, et al.* v. *Walsh Brothers,* 36 Fed. 607); a bartender (*The J. S. Warden,* 175 Fed. 314); a sealer on a fishing vessel (*The Ocean Spray,* 18 Fed. Cas., p. 558); a person operating engine of a pile driver on a freight boat (*Lawrence, et al.* v. *Flatboat,* 84 Fed. 200, aff'd p. c. 86 Fed. 907); a watchman (*Grimberg* v. *Admiral Oriental S.S. Line,* 300 Fed. 619); a wireless operator (*The Buena Ventura,* 243 Fed. 797, 2nd case); an employee on a steam dredge (*Saylor* v. *Taylor,* 77 Fed. 476).

In *Disbrow* v. *Walsh Brothers,* 36 Fed. 607 (*supra*), the Court said:

> "The chief part of their work was loading and unloading the cargo. To quit work as they did was to subject the barge to the liability of special expenses,

whether she undertook to get other persons to supply the libelants' places, or undertook to discharge without their aid, and thereby lose two days' time" (608).

In *Lawrence* v. *Flatboat,* 84 Fed. 200 (*supra*), the Court said:

"Any service is maritime if substantially to be performed on water within the ebb and flow of the tide. * * * The proctor for claimant practically concedes this proposition, but his contention is that the libelants were not seamen, and performed no, or but little, maritime services on the boat. * * * While it is true that the navigation of the boat from place to place in the bay was only incidental to the work of erecting the bulkheads, which was the main object of her employment, * * *, I cannot agree with the able proctor in the conclusion that the work done and the services rendered were not maritime in their character and created no lien upon the vessel. The work done by the vessel related to and was an aid to navigation and commerce, and the services rendered by the libelants were rendered in the special business of the vessel and in furtherance of the work in which she was engaged" (201-202).

In *Saylor* v. *Taylor,* 77 Fed. 476, C. C. A. 4 (*supra*), the Court said:

"If this craft, this movable thing, capable of being transported on the water, and engaged in a work incidental to navigation, in shovelling mud and removing it by water, is a vessel, then she comes within the maritime jurisdiction, and the persons employed on her in that work are seamen, and the lien on the vessel for wages is correlative" (477).

The cases holding that workmen employed on barges and other non-self-propelled vessels are entitled to maritime liens have been held "peculiarly applicable" in construing the Fair Labor Standards Act. *Gale* v. *Union Bag & Paper Corporation,* 116 F. (2d) 27, 28, cert. den. 313 U. S. 559.

POINT II

The legislative history supports petitioner's contention that respondents are seamen within the meaning of the Fair Labor Standards Act.

(a) The Fair Labor Standards Act of 1938 became a law at a time when the meaning of comparable terms of exclusion in other remedial statutes had been crystallized by decisions in the Federal courts.

In the Merchant Marine Act of 1920, Sec. 33, 41 Stat. 988, 46 U. S. C. 688 (popularly known as the Jones Act), coverage was extended to "any seaman". In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926), this Court held that "seaman" included any person employed in "maritime work in navigable waters" and that a stevedore was such an employee.

Coverage of the Longshoremen's and Harbor Workers' Act, 1927 (33 U. S. C. 901, *et seq.*), was made dependent on whether the employee is "a master or member of a crew of any vessel." In *DeWald* v. *Baltimore & O. R. Co.*, 71 F. (2d) 810 (C. C. A. 4) (1934), the Court held that a bargee was not "a master or member of a crew" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act. In reaching this result the Court said:

> "It is to us reasonably clear that Congress intended to except from the benefits of the Longshoremen's Act only those persons ordinarily and generally considered as seafaring men, at least only those employed on board a vessel having a master and crew. It is significant that Congress did not use the term 'seaman' in section 3 of the act (33 U. S. C. A. § 903). It would, undoubtedly, have used that term had it intended to exclude from the benefits of the act all those who have been held by the courts to be seamen in the more liberal interpretation of the term" (813).

It is apparent that in 1937 and 1938 when Congress was called upon to choose language to define the class of maritime employees to be excluded from coverage of that Act, the distinction between "seaman" and "master or member of a crew" had been clearly drawn. It must be assumed that this distinction was recognized by Congress and that in selecting "seaman", it intended a different result than if it had chosen "master or member of a crew".

In *Gale* v. *Union Bag & Paper Corporation*, 116 F. (2d) 27 (C. C. A. 5), cert. den. 313 U. S. 559, the Court, in holding that a barge tender employed on a non-self-propelled barge was a seaman within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act, recognized, with conclusion implicit that like limitation did not pervade the meaning of "seaman" under the Fair Labor Standards Act, that Congress in selecting the language "master or member of a crew" as the term of exemption under the Longshoremen's and Harbor Workers' Compensation Act intended to exclude an employee "who might be considered a seaman within the ordinary meaning of the word * * *" (28). The Court adopted the broadest possible interpretation of "seaman" by referring to *International Stevedoring Company* v. *Haverty*, 272 U. S. 50, and the definition of "seaman" under the Merchant Seamen's Act which provides that any person is a seaman "who shall be employed or engaged to serve in any capacity, on board a '* * * vessel belonging to a citizen of the United States'" (46 U. S. C. A. 713), and the equally broad definition under the Public Health Law (18 Stat. 485, 24 U. S. C. Sec. 1).

It was proper appreciation of this construction without guidance of the decision in *Norton* v. *Warner Co.*, 321 U. S. 565, that led the District Court in *Berwind-White Coal*

Mining Co. v. *Rothensies,* 45 F. Supp. 55, to hold that barge and lighter captains did not have the status of "member of a crew". As said by the District Court in the *Berwind-White case* (45 F. Supp. 55, 60):

> "I fail to see how the plaintiff's case is helped by the decision in *Gale* v. *Union Bag & Paper Corp.,* supra, since all of the cases referred to clearly indicate that Congress intended 'seamen' to have a broader connotation than 'officers or members of a crew'."

Other recent decisions have recognized that "seamen" is a term at least as broad if not broader than "master or member of a crew". In *Norton* v. *Warner Co.,* 321 U. S. 560, this Court said:

> "'Seamen' as used in a particular context may of course have a broader meaning than 'crew'. *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, and see *Carumbo* v. *Cape Cod S.S. Co.,* 123 Fed. (2d) 991."

As the Court said in *Carumbo* v. *Cape Cod S.S. Co.,* 123 F. (2d) 991 (C. C. A. 1):

> "While courts have sometimes used the expressions 'seaman' and 'member of a crew' interchangeably, *Moore Dry Dock Co.* v. *Pillsbury,* 9 Cir., 1938, 100 F. 2d 245; *Diomede* v. *Lowe,* 2 Cir., 1937, 87 F. 2d 296, it is well established that the word 'seaman' under the Jones Act does not mean the same thing as 'member of a crew' under the Longshoremen's Act. 'Seamen' is broad enough to cover both one who is a 'member of a crew' and one who is not a 'member of a crew' (p. 994).

(b) The benefits reserved to seamen under the General Maritime Law offset the usual assumption that exemptions in remedial statutes are to be narrowly construed.

The cases heretofore considered demonstrate beyond any doubt that appellants are entitled to maritime liens as security for wages and that they may sue under the Jones Act.

The existence of these privileges has been regarded as "peculiarly applicable in construing the Act". *Gale* v. *Union Bag and Paper Corp.*, 116 F. (2d) 27 (*supra*), at page 28. Also appellants as employees on American vessels may obtain free treatment at marine hospitals (24 U. S. C., Sec. 1), and they are entitled to maintenance and cure.

The importance of these privileges, in construing the comparable but more restricted exemption terminology of "master or member of a crew" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, was recognized in *Norton* v. *Warner Co.*, 321 U. S. 560 (*supra*), this Court saying:

> "On the other hand, those who are not covered by it [Longshoremen's and Harbor Workers' Act] but who are protected by maritime law are entitled to maintenance and cure, a remedy not restricted to accidents. As we said in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 732, 'In this respect it is a broader liability than that imposed by modern workmen's compensation statutes.' Moreover, seamen may sue under the Jones Act (41 Stat. 988, 1007, 46 U. S. C. § 688) for injuries in the course of their employment, and in such actions assumption of risk is no defense. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424. Suit may be brought in admiralty for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, and cases cited. These are basic rights" (570-71).

(c) The hearings on the Black-Connery Bill, as well as legislative debate indicate that the term "seaman" as used in Section 13 (a) (3) of the Act was not intended to have a restricted meaning.

On May 24, 1937, President Roosevelt in an address to a joint session of Congress urged that the Congress enact legislation to improve wage and hour conditions of workers on farms and in industries which in general terms may be

described as engaged in production of goods. The text of this message in part is as follows:

> "Today, you and I are pledged to take further steps to reduce the lag in the purchasing power of industrial workers and strengthen and stabilize the markets for the farmers' products. The two go hand in hand. Each depends for its effectiveness upon the other. Both working simultaneously will open new outlets for productive capital. * * *."

And, concluding the message, the President said:

> "Legislation can, I hope, be passed at this session of Congress further to help those who toil in factory and on farm. We have promised it, we cannot stand still" (See 81 Cong. Rec. 6894).

On the same day that this message was delivered, identical bills were introduced in the House and Senate which jointly were known as the Black-Connery Bill, taking its name from the Senate and House sponsors thereof. After much debate, Congress ultimately excluded agricultural laborers from the bill.

When the bill was drawn, there was no express exemption of seamen, although the chairman of the Joint Committee,* Senator Black, said:

> "I do not believe that bill (S. 2475), as written covers the seamen, although there may be a question about it." **

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* Joint Hearings before the Committee on Education and Labor (Senate) and the Committee on Labor (House) on S. 2475 and H. R. 7200, 75th Congress, 1st Session, pp. 1216-1217.

** This statement suggests *Ellis* v. *United States*, 206 U. S. 246, where Holmes, J., held that seamen (employees on scows and floating dredges) were not covered by a statute relating to "the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the United States and of the District of Columbia", even though there was no express exemption.

At the Joint Hearings, E. R. Howell submitted the following statement in behalf of the Sailors' Union of the Pacific:*

> "In this connection, I would refer you to the Social Security Act for legislative precedent. By specific language, seamen are excluded from participation in that benefit.**
>
> To further emphasize the point, I would refer you to section 2(a), subsection 7, of the proposed act, wherein certain exclusions are listed, among them agricultural laborers. Seamen are not mentioned, and it can be presumed, and it indeed is the opinion of some authorities that seamen could be included in the definition of 'employee' as set out in section mentioned.
>
> However, it is our honest opinion that the purpose of the law is to make provision for the prevention of unfair labor practices in industries not already covered by law, particularly in industries engaged in the production of commodities and goods. This conclusion would seem to be borne out by the exception of agricultural laborers from the definition of 'employee' in the proposed act. I would point out that so far as the seamen are concerned, they are not engaged in production; rather they are part of the 'carrier' system.
>
> But the bill is not clear on that point, and in our opinion, it should be made so."

Mr. Howell referred to Maritime Commission control of wages of seamen employeed on subsidized vessels, but he first pointed to the authority previously existing in the National Labor Relations Board to adjust seamen's wage disputes, and stated that to authorize control over seamen's

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* Joint Hearings before the Committee on Education and Labor (Senate) and the Committee on Labor (House) on S. 2475 and H. R. 7200, 75th Congress, 1st Session, pp. 1216-1217. This statement is set out in full in the Appendix to this supporting brief, *infra*, pp. 35-38.

** This statement does not support the conclusion of the Circuit Court of Appeals below that the exclusion of "officers or members of a crew" within the meaning of the Social Security Act, as extended by administrative regulation, is broader than the "seaman" exemption under the Fair Labor Standards Act (R. Vol. B, p. V).

wages under the Fair Labor Standards Act "would overlap the duties and authority of the National Labor Relations Board". Respondents are as much subject to the jurisdiction of the National Labor Relations Board as are any other seamen.

Concluding his statement, Mr. Howell said:

> "Our union does not like to see any further or additional legislation enacted to cover a group of workers already so well covered, which might tend to create some confusion in labor relations, which are now on the road to practical and successful operation."

In this spirit, petitioner has conducted its business and by collective bargaining has worked out with respondents agreements as to wages and hours best suited to the unusual conditions of transportation by water and lighterage of cargo. Not until March of 1945 when the Administrator of the Wage and Hour Division, by his attorneys, petitioned the Circuit Court of Appeals for leave to file a brief *amicus curiae* was there any suggestion from the Department of Labor that petitioner's employees on its lighters and barges were considered as non-exempt.

Ralph Emerson, appearing in behalf of the National Maritime Union,* also requested that seamen be expressly exempted partially on the ground that the seamen whom he represented, at least those employed on subsidized vessels, were subject to wage and hour control by the Maritime Commission.**

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* Joint Hearings before Committee on Education and Labor (Senate) and Committee on Labor (House) on S. 2475 and H. R. 7200, 75th Congress, 1st Sess., pp. 544-549.

** Colonel Kenneth Gardner, testifying before the House Merchant Marine Committee on March 6, 1945, stated in response to question by Representative Weichel (Rep., Ohio) that before the war there were only 150 subsidized ships. The Journal of Commerce, March 7, 1945, p. 18.

Following the Joint Hearings and when the Bill was reported back to the Senate, Senator Black, in referring to the present Section 13(a) (3) exemption stated that the bill was written in such a way as to exclude "maritime workers" from coverage (81 Congressional Record 7875). The term "maritime workers", the broadest possible description of the exemption, is in harmony with the purpose of the Act as outlined by President Roosevelt, as well as the understanding of Mr. Howell, that the bill did not apply to transportation workers with or without express exemption.

Statements by other Senators made in debate on the bill throw light on the "seaman" exemption. In discussing this exemption and that in Section 13 (a) (5), Senator George said:

> "Seamen, people who take sponges and fishes from the ocean and from other waters are not within the bill" (81 Cong. Rec. 7784).

Senator Bridges, speaking generally of exemptions in the statute, said:

> "Occupations exempted: The Black bill exempts executive, administrative and professional employees, persons engaged in local retailing, seamen, railway workers, and persons employed in fishing and agriculture" (81 Cong. Rec. 7792).

Nowhere is there a single statement to the effect that the term "seamen" should be given anything but its long-accepted meaning. We submit that proper construction is that adopted by the Fifth Circuit in *Gale* v. *Union Bag and Paper Corporation*, 116 F. (2d) 27, cert. den. 313 U. S. 159:

"The word 'seaman' has a plain, ordinary meaning universally applied. Whether a person is a seaman depends upon the character of his duties. If they are maritime in character and rendered on a vessel in commerce, in navigable waters, he is a seaman" (pp. 27-28).

POINT III

This case calls for an exercise of this Court's power of supervision.

By disregarding the settled meaning of the seaman exemption and by adopting a new and artificial line between seamen and non-seamen within the meaning of the Fair Labor Standards Act, the Court below has destroyed the simple and precise definitions in reliance upon which companies like petitioner have for years conducted their businesses. Moreover, the opinion of the Circuit Court of Appeals, following its own views as to desirable coverage of the Act, has clearly substituted its wisdom for that of Congress in determining whether or not these seamen should be exempt. Respondents unquestionably are seamen, regardless of whether or not they have substantial duties in connection with cargo. Petitioner submits that the Circuit Court of Appeals has committed errors so serious in its effort to *establish* the law of this exemption as to call for an exercise of the corrective jurisdiction of this Court by writ of certiorari.

That there is no jurisdictional bar to reviewing an order of remand is now well settled. *American Seating Co.* v. *Zell*, 322 U. S. 709; *Gay* v. *Ruff*, 292 U. S. 25, 28-31.

CONCLUSION

It is respectfully submitted that the writ of certiorari prayed for should be granted to the end that this action may be reviewed and determined by this Court; and the order of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

CHAUNCEY I. CLARK,
HERBERT M. LORD,
Counsel for Petitioner.

New York, N. Y.
June 6, 1945.

APPENDIX

(Statement of the Sailors' Union of the Pacific, submitted for the record by Representative Richard J. Welch:)

SAILORS' UNION,
Washington, D. C., June 23, 1937.

To the Honorable Members of the Joint Committee on Labor, Washington, D. C.

SIRS: Having been unable, during the course of the hearings conducted under your auspices on the Fair Labor Standards Act of 1937, to appear before your committee in person, I take this means of communicating to you the position of the Sailors' Union of the Pacific with respect to the aforementioned bill.

I understand that the committee invites constructive discussion, and I trust that what I have to offer will fall into that category.

Representing as I do, the 8,000 members of the Sailors' Union of the Pacific I wish to say first of all, that this organization has, for 52 years, been in the forefront of every struggle for better conditions for seamen, and we see in this bill, a long forward step in the direction toward which we have pointed our own efforts. The provisions for abolition of child labor, industrial espionage and strike-breaking are most commendable.

Without going into some of the usual controversial sections of the proposed act, I would say that the two things which we would discuss here are—

1. Does the scope of the bill extend the authority of the Board to cover seamen?

2. Will the Board as set up under the proposed act in any way, transcend, supplant, supersede, or overlap the authority and duties of the National Labor Relations Board or the Maritime Commission, as their authority and duties apply to seamen?

As we read and interpret the proposed act, the answer to both questions is yes.

With respect to no. 1, the bill as written, does not specifically except the seamen from the operation of the provisions of the act. At the same time, there is nothing in the bill which repeals any previous acts or parts of acts with which its proposed provisions may conflict.

In this connection, I would refer you to the Social Security Act for legislative precedent. By specific language, seamen are excluded from participation in that benefit.

To further emphasize the point, I would refer you to section 2 (a), subsection 7, of the proposed act, wherein certain exclusions are listed, among them agricultural laborers. Seamen are not mentioned, and it can be presumed, and it indeed is the opinion of some authorities that seamen could be included in the definition of "employee" as set out in section mentioned.

However, it is our honest opinion that the purpose of the law is to make provision for the prevention of unfair labor practices in industries not already covered by law, particularly in industries engaged in the production of commodities and goods. This conclusion would seem to be borne out by the exception of agricultural laborers from the definition of "employee" in the proposed act. I would point out that so far as the seamen are concerned, they are not engaged in production; rather they are part of the "carrier" system.

But the bill is not clear on that point, and in our opinion, it should be made so.

With respect to no. 2, I would respectfully call your attention to the provisions of section 10 of the National Labor Relations Act of 1935, which section is entitled "Prevention of Unfair Labor Practices." It reads in part:

"SEC. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

I understand that opinions have been asked as to whether section 8 as referred to above covers all the points covered in the proposed act, particularly as regards espionage and strikebreaking, and that in the event section 8 is held insufficient in those respects, new legislation will be asked for in remedy of those defects. However, with respect to other practices, it would seem that the duties and authority of the proposed board would overlap the duties and authority of the National Labor Relations Board.

Further attention is called to title III, section 301, of the Merchant Marine Act of 1936, wherein the Maritime Commission is empowered to perform, for subsidized vessels of the United States Merchant Marine, duties similar to those assigned to the proposed board under H. R. 7200 and S. 2475. The section referred to reads in part:

"SEC. 301 (a). The Commission is authorized and directed to investigate the employment and wage conditions in ocean-going shipping and, after making such investigation and after appropriate hearings, to incorporate in the contracts authorized under Titles VI and VII of this Act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy. * * *"

Here again, if seamen are to be included in the definition of "employee" as set out in section 2 (a), subsection 7, of the proposed act, it would appear that the authority of the proposed board would overlap the authority and direction of the Maritime Commission.

I offer these references and observations for your consideration, because within the past 3 years, the seamen, through organized effort, have reached certain agreements which have resulted in better conditions for them. These

agreements have been so written as to be operative within the present provisions of the law with respect to labor relations between employer and employee.

Our union does not like to see any further or additional legislation enacted to cover a group of workers already so well covered, which might tend to create some confusion in labor relations, which are now on the road to practical and successful operation.

Therefore, I ask on behalf of the Sailors' Union of the Pacific, that the bill be so written as to exclude the seamen from the operation of the provisions of the bill.

Respectfully,

E. R. HOWELL,
Assistant Secretary and Legislative Representative.

(38)

JUL 18 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1362 121

MANHATTAN LIGHTERAGE CORPORATION,

Petitioner,

—against—

ERNEST ANDERSON, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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upreme Court of the United States

OCTOBER TERM, 1944

No. 1362

MANHATTAN LIGHTERAGE CORPORATION,
Petitioner,

—against—

ERNEST ANDERSON, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement

Respondents brought this action under Section 16 (b) f the Fair Labor Standards Act of 1938 to recover npaid overtime compensation due them pursuant to ection 7 of the Act. Petitioner, after having taken he depositions of some of the respondents, moved for ummary judgment on the ground that the respondents ere seamen within Section 13 (a) (3) and therefore ere not subject to overtime provisions of Section 7. he motion for summary judgment was accompanied by

the affidavit of Harry C. Shanks, president of the petitioner (R., 20). The respondents, among whom was Ernest Anderson, filed affidavits in opposition to the motion for summary judgment. (See stipulation in the printed Record on Appeal permitting the parties to incorporate in their briefs any portion of the data which was submitted on the motion for summary judgment.) In view of the fact that all of the affidavits of the respondents submitted in opposition were similar, one affidavit, namely, that of Ernest Anderson, was set forth in full in the brief of the respondents before the Circuit Court of Appeals and appears in full in this brief on pages 5 to 8 inclusive.

POINT I.

This Court has held the term "seamen" to apply to those persons who aid in the navigation of a vessel.

The work performed by the respondents was not in aid of navigation but concerned the loading and unloading of lighters and was comparable to work performed by longshoremen or harbor workers.

This Court has held that the nature of the work performed will determine the status of the person employed. If the work is in aid of navigating the vessel, the employee is classified as a "seaman". If the tasks performed concern loading and unloading or other work not in aid of navigation, he is classified as a "harbor worker" comparable to the work performed by a longshoreman.

Counsel for petitioner have set forth in their brief many definitions of the term "seamen". They have gone far afield to sustain their position. We are not concerned with definitions of this term when other statutes were interpreted.

We are here concerned with the interpretation of the Fair Labor Standards Act of 1938 and the intention of the law makers who passed that Act. As was said by this Court in *Warner* v. *Gottra*, 293 U. S. 155, 158:

> "What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained."

In passing upon the Act here involved, this Court said (*Phillops Inc.* v. *Walling*, decided March 26, 1944):

> "Exemptions from this humanitarian and remedial legislation are to be narrowly construed and to extend them to persons other than those clearly within the terms and spirit of the act is to abuse the interpretative process and to frustrate the announced will of the people."

It will be recalled that Mr. Justice Holmes said (*Towne* v. *Eisner*, 245 U. S. 418, 425):

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Counsel for petitioner refer to *International Stevedor-*

ing Co. v. *Haverty,* 272 U. S. 50, as authority for their position that a longshoreman in the broad sense may be considered a seaman. As a matter of fact, longshoremen are not seamen, but harbor workers. No one up to this time has challenged their right to receive the benefits of the Fair Labor Standards Act. It is fair to state that the *Haverty* decision can in no way affect the issues in this matter because the Court in that case was careful to point out:

> "It is true that for most purposes as the word is commonly used stevedores are not seamen."

However, whatever confusion existed as to the interpretation of the decision in the *Haverty* case, it was subsequently cleared up by this Court in the case of *Warner* v. *Goltra,* 293 U. S. 155, when it stated:

> "None the less the verbal niceties were bent to the overmastering purposes of the act to give protection to workers injured on ships. Words we said are flexible."

Before referring to the definition of seamen as evolved by this Court, we think it appropriate to set forth the affidavit of Ernest Anderson submitted in opposition to the motion for summary judgment in the District Court. Prior to the making of the motion, the petitioner had procured depositions from the respondents. In view of the fact that the duties of the respondents were not fully set forth in the depositions made by the respondents, counsel for the respondents found it necessary to state these duties in full in the affidavits which were submitted in opposition to the motion for summary judgment. The affidavits of the respondents are similar and for that reason they were not printed in the Record on Appeal, but by stipulation which the

printed Record contains, the parties had the privilege of referring to any data which was submitted on the motion for summary judgment. The affidavit of the respondent Ernest Anderson is as follows:

"State of New York,
County of New York,

ERNEST ANDERSON, being duly sworn, deposes and says:

I am one of the plaintiffs in the above entitled action. My home is 48 Wadsworth Avenue, Fort Wadsworth, Staten Island, New York City, where I reside. Throughout my period of employment by the defendant, I did not live aboard any vessel and my work day was from 8:00 A. M. in the morning to 5:00 P. M., that is, an eight hour day. During all the time I was employed by the defendant my work was in conjunction with a lighter, which is a vessel not propelled by its own motive power. My work did not require me to sleep, live nor cook aboard the vessel as I was employed only on a eight hour day basis.

My principal occupation was loading cargo onto the lighter and unloading it by means of a gasoline operated winch which was on the lighter. I acted as winchman, making the winch lift and lower the draughts of cargo going on or off the lighter. I acted exactly as the winchman in a longshore gang acts loading and unloading a boat. I work with the other longshoremen for the defendant and they worked with me putting the cargo into different places on the dock of the lighter or in different places on the dock while the lighter was at rest in the harbor.

When I reported to work at 8:00 A. M. of the average day, there were many shore duties to which I had to attend. I had to inspect many packages or pieces of cargo which were on the pier, examine their markings and see if they corresponded to the marks on the papers which had been given to me for loading onto the lighter. After locating the various items and checking them against the papers, I went to the street end of the pier and shaped-up a gang of longshoremen to work with me in the loading and unloading of the lighter: I hired these men ashore and at 5:00 P. M. when we all went home I paid these men off making note of their social security numbers. This also took place ashore. I acted exactly when doing this as a stevedore foreman does. When locating the cargo and checking the marks on the pier, I also was required to examine the condition of the cargo and make written note of any unusual condition or discrepancy. As each piece of cargo went aboard the lighter, I tallied it checking it against the papers I had both as to quantity, quality and description. In these latter operations, I acted precisely the same as a pier checker who checks loading and unloading. At other times I stood on the side of the dock and ran the hook, that is, hooked on and unhooked the cargo hook, which by means of a block and fall and winch, hauled the cargo on and off the pier. In this connection my function was similar to that of a gangwayman of a longshore gang.

All of the former duties directly loaded and unloaded the cargo of the lighter. All of the duties hereinbefore mentioned took up about 95% of my working time.

Once in a great while some water would gather in the bottom of the lighter and the hoist as it operated pumped out this accumulation. On occasion, if asked, I handled the lines handed to me by members of a tug's crew. On rare occasion, may be once a week or once every ten days, the lighter was towed during the day between 8:00 A. M. and 5:00 P. M. The towing time was from one-half hour to one hour and a half, total. The tug boat, which hauled the lighter, was in complete charge of the tow and I had nothing to do with telling the tug's crew where to take the lighter or how. Before I went home at night, I occasionally looked at the lines holding the lighter in place to see that the lighter was properly tied up. These activities and other miscellaneous activities consumed not more than 5% of my working day.

I was not paid on a monthly basis as seamen are. I was paid on a daily basis nor was I required to have any seamens' certificates. I was not on any boat twenty-four hours a day as seamen are. Two-thirds of each average twenty-four hour day I was not on the lighter at all. I was only there as longshoremen are, during the loading and unloading of the lighter. The lighter on which I performed a great deal of my work was called a 'stick lighter' or gasoline hoist lighter. It was not a barge.

The lighter was towed as a rule at night when I was not there. The tug boat crew took complete charge. I had no duties therefore in conjunction with navigation or transporting. My primary duty was not to be aboard the lighter as the affidavit of Harry C. Shanks might suggest.

The lighter was non-self-propelled and had no crew. I did work on and off the lighter. I knew nothing about any Certificate of Enrollment. The mere fact that the vessel aboard which I was employed part of the time was an enrolled vessel did not make me a seaman any more than a customs inspector working aboard a vessel would become a seaman just because the vessel was an enrolled one.

The lighter in conjunction with which I did my work was employed only in the harbor of New York. Deductions were made from my pay for social security benefits and I was also entitled to unemployment insurance benefits, all of which seamen do not get.

I am not a seaman under the recent decisions of the United States Supreme Court, in the cases of *Augustus P. Norton* v. *Warren Company*, decided on March 27, 1944 and *South Chicago* v. *Bassett*, 309 U. S. 251, and therefore I am entitled to the benefits of the Fair Labor and Standards Act. The motion by the other side should be denied.

ERNEST ANDERSON.

Sworn to before me, this
5th day of June, 1944.

HARRIS LEVY,
Notary Public, Bronx County."

In discussing the Federal Longshoremen and Harbor Worker's Act, this Court interpreted the terms "master" and "members of the crew". In general, this Court has referred to "members of the crew" as being "seamen"

and "seamen" as being "members of the crew". The terms are interchangeable.

In *Norton* v. *Warner*, 321 U. S. 565, decided on March 27, 1944, this Court had occasion to define "seamen" and "members of the crew" and to as well consider the duties which distinguished harbor workers from "seamen" and "members of the crew". The opinion is as follows:

> "In the *South Chicago* case, *supra*, the matters which were deemed (p. 260 of 309 U. S. 60 S. Ct. 544, 84 L. Ed. 732) to justify the Commissioner's conclusion that the claimant in that case was not 'master or member of a crew' were that his primary duty was to facilitate the flow of coal to the vessel being fueled from the lighter upon which he worked, that he had no duties while the lighter was in motion, that he slept at home and boarded off ship and that he was called for service each day as wanted and was paid an hourly rate. Some of the same restricted characteristics of employment are to be noted in *DeWald* v. *Baltimore & O. R. Co.*, 4 Cir. 71, F. 2d 810, 811; *Moore Dry Dock Co.* v. *Pillsbury*, 9 Cir. 100 F. 2d 245 and *Henderson* v. *Jones*, 5 Cir., 110 F. 2d 952. On the other hand, in the instant case, just as in the *Loverich* case, the claimant's duties required him to be aboard the barge and to be concerned with its management, care and operation. *He was therefore a seaman and as such, comes within the description of those who, as master or member of a crew, are expressly excluded from the remedy provided by the Compensation Act.*" (Italics ours.)

In *South Chicago* v. *Bassett*, 309 U. S. 251, the Court

at pages 258 and 259 stated:

> "The word 'crew' does not have an absolutely unvarying legal significance. As Mr. Justice Story said in *U. S.* v. *Winn*, 3 Sumn 209, the general sense of the word 'crew' is equivalent to 'ship's company', which would embrace all the officers as well as the common seaman. But it was observed that the laws upon maritime subjects sometimes used the word 'crew' in that general sense, and sometimes in other senses more limited and restricted. It is sometimes used to comprehend the officers and common seaman, excepting the master and sometimes to comprehend the common seaman only, excluding the master and officers * * *. In *The Bound Brook*, 146 Fed. p. 160, 164 *it was said that 'when the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation without reference to the nature of the arrangement under which they are on board'.*" (Italics ours.)

In *Norton* v. *Warner*, (*supra*), this Court quoted the definition of "seamen" as it appeared in the *Buena Ventura*, 243 Fed. 797, 799 as follows:

> "Everyone is entitled to the privilege of a seaman, who like a seaman at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage."

In *South Chicago* v. *Bassett*, 309 U. S. 251, 260, this Court stated:

> "The fact that the certificate of inspection call-

ed for three 'deckhands' and that the captain included the decedent to make up the complement is not controlling. The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the Court considered as supporting the findings of the Deputy Commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water'. *Schaeffler* v. *Moran Towing Co.*, 68 F. 2d 11, 12."

Counsel for petitioner contend that the determination of the Circuit Court in this case should be reversed on the authority of *Norton* v. *Warner* (*supra*). The contention is untenable. *Norton* v. *Warner* (*supra*) and *South Chicago* v. *Bassett*, (*supra*) supplement each other and leave no doubt as to what this Court decided. In *South Chicago* (*supra*), the injured employee was held to be a harbor worker and not a seaman because his duties were not in aid of navigation. In *Norton* v. *Warner*, (*supra*), the injured was held to be a member of the crew and a seaman because his work was in aid of navigation. The affidavits and depositions of the respondents make it perfectly clear that the respondents' duties concerned the loading and unloading of the various vessels to the extent of 95% of their time employed and

that but 5% of the time they were engaged in miscellaneous work, some of which might be considered in aid of navigation.

An excerpt from *Norton* v. *Warner*, 321 U. S. 565, 567, illustrates the point involved:

> "Rusin was employed as a boatmen on a barge which at the time of the injury was afloat on the navigable waters of the United States. The barge had no motive power of its own and was moved either by towing * * *. Rusin was employed under a union contract with respondent which stated that all Bargemen assigned to specific barges in active operation were to be paid a monthly salary of $80 and were to be provided with quarters. It also stated that compensation was for all work performed by Bargemen in the operation of his own vessel and that the rates provided were based upon all services and time required to safeguard and operate the barge fleet including necessary pumping, watching or other emergency duties on Sundays and holidays. Rusin was continuously aboard. He bought his own meals and lived, ate, and slept on the barge * * *. His duties consisted of taking general care of the barge. They included taking care of the lines at docks, tightening them or slackening them as necessary, and repairing leaks, pumping out the barge; taking lines from tugs, responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tug boat when being towed; moving the barge at piers by the capstan. * * *. *But he had no duties in connection with the handling of cargo and no shore duties.*" (Italics ours.)

See to the same effect:

Puget Sound v. *Marshal,* 125 Fed. 2d 876 and 879;

Beddo v. *Smoot Sand & Gravel Corp.,* 128 Fed. 2d 608;

DeWald v. *Baltimore & O. R. R. Co.,* 71 Fed. 2d, 811, cited with approval in *South Chicago* v. *Bassett,* 309 U. S. page 260.

POINT II.

The Administrator for the Fair Labor Standards Act intervened in the court below and contended that the respondents were not seamen but harbor workers and entitled to the benefits of the Act.

The Circuit Court of Appeals for the Second and also for the Seventh Circuit have adopted the definition of the term "seamen" as defined by the administrator in his Interpretative Bulletins.

The Administrator for the Fair Labor Standards Act subsequent to the passage of the act was called upon to define and classify those workers who were exempted by the Act. Seamen were exempted and it became necessary for the Administrator to issue Interpretative Bulletins. In January, 1942, the Administrator of the U. S. Department of Labor, Wage and Hour Division, in Interpretative Bulletin No. 11, stated:

"6. Employees on lighters and other barges which are not self-propelled, ordinarily are not within this exemption. Their duties require them to supervise the loading and unloading of the vessel, to act as caretaker of the vessel when loaded, and to handle receipts and inventories of the cargo. The duties performed by these employees, including the handling of the lines used in towing or maneuvering the barge or lighter, are performed primarily as custodians of the cargo, and, therefore, do not bring them within the exemption. However, employees on seagoing barges who are working under seamen ratings required by law, would seem to be employed as seamen."

In July, 1943, in Interpretative Bulletin No. 11, the Administrator, stated, at paragraph 3:

"An employee will ordinarily be regarded as 'employed as a seaman' if he performs, as master or subject to his authority * * * service which is rendered primarily as an aid in the operation of such vessel and as a means of transportation, provided he performs no substantial amount of work of a different character."

Section 6 states:

"Barge tenders are non-self-propelled barges who perform the normal duties of their occupation, such as attending to the lines and anchors, putting out running and mooring lines, pumping out bilge water, and other similar activities necessary and usual to the navigation of barges, are considered seamen within this exemption unless they do a substantial amount of non-exempt work.

Loading and unloading and activities relative thereto will be considered non-exempt work". (Italics ours.)

This Court will note that both Interpretative Bulletins specified that loading and unloading of barges or lighters constitute work which entitled the employee to the benefits of the Act.

Three Circuit Courts of Appeals have recently passed upon appeals involving the exemption of seamen from the Act. In the case at bar Judge Clark, among other things, said:

> "But the applicable interpretation by the Wage and Hour Administrator, to which we must give considerable weight in arriving at a proper definition of the scope of the exemption now before us, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 136, cf. *Duquesne Warehouse Co.* v. *Railroad Retirement Board*, 2 Circ., March 12, 1945, excludes therefrom 'barge tenders on non-self-propelled barges' who 'do a substantial amount of non-exempt work' such as 'loading and unloading and activities relative thereto.' Interpretative Bulletin No. 11—Seamen Exemption, July, 1943, par. 6. The word 'substantial' denotes a comparison based on a ratio of nautical to longshore duties. Hence guided by the Administrator's interpretation, the showing by affidavit that 95 per cent of plaintiffs' work is 'non-exempt' precludes summary judgments against the plaintiffs."

In *Walling* v. *Great Lakes Dredge & Dock Company*, decided by the Circuit Court of Appeals for the Seventh Circuit, on April 24, 1945, the facts were similar to the facts involved in the case at bar. The question there

was whether persons working on vessels which had machinery for dredging were to be considered seamen or harbor workers. The Circuit Court of Appeals held that they were harbor workers and not seamen. The respondents were employed upon lighters which had hoisting machinery for loading and unloading of freight. In the *Walling* case there was a similar apparatus for dredging the beds of navigable waters. In neither instance could it logicaliy be claimed that the work done was in aid of navigation. A portion of the opinion in *Walling* v. *Great Lakes Dredge & Dock Company* is as follows:

> "An administrative interpretation by the Administrator for the guidance of the administration of the Act provides:
>
> > 'An employee will ordinarily be regarded as employed as a seaman if he performs as master or subject to authority * * * of the master * * * service which is rendered primarily as an aid in the operation of such vessel as a means of transportation * * *'. The exemption does not extend to employees working aboard vessels whose service is not rendered primarily as an aid in the operation of the vessel, as a means of transportation. Thus employees of floating equipment * * * 'and employees engaged in dredging operations or in the digging or processing of sand, gravel, or other material are not employed as seamen.' This interpretation was issued July, 1939 and amended in 1943.
>
> In the hearing before the Joint Congressional Committees, a legislative representative of the Na-

> tional Maritime Union appeared and discussed the status of seamen. He pointed out that the Merchant Marine Act of 1936 provided that the Maritime Commissions have jurisdiction of wage conditions."

The Circuit Court of Appeals for the Fifth Circuit in *Gale* v. *Union Bag & Paper Corporation,* 116 Fed. 2d 27 had occasion to review the claims for overtime pay of persons working on vessels. The Circuit Court of Appeals in that case found that the work performed by the claimants was in aid of navigation and did not concern the loading and unloading of the vessels. Under the circumstances, the Court held that the claimants were seamen and not entitled to the benefits of the Act.

There is no conflict among the various Circuit Courts of Appeals as to the rule of the law established in *Norton* v. *Warner* and *South Chicago* v. *Bassett* (*supra*).

We adopt for our purposes the argument advanced by the Administrator when he intervened in the Court below. On pages 5, 6, 9 and 10 of the Administrator's brief, he stated:

> "In interpreting Section 13 (a) (3) for the guidance of persons affected, the Administrator of the Wage and Hour Division has, for the purposes of that section, defined a 'seaman' as one who performs aboard a vessel 'service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. * * * Loading and unloading and activities relative thereto will be considered non-exempt work.' See Interpretative Bulletin No. 11, July, 1939, revised July, 1943, pars. 3, 6. Unquestionably, plaintiffs are not 'seamen'

under this definition. They are not naturally and primarily on board the lighters to aid their navigation. Ninety-five per cent of their work is in loading and unloading other vessels; only on rare occasions are they even on board the lighter while it is in tow and on those occasions their duties are trivial.

We submit that the Administrator's interpretation, as applied to this case, is clearly valid and should be followed by the Court. The distinction which he draws between workers whose primary duties relate to the operation of a vessel as a means of transporting persons or goods, on the one hand, and workers chiefly engaged in loading and unloading goods, on the other, follows a well established line of demarcation."

"The critical question, therefore, is one of fact. Is the work of the employee directed to the navigation of a vessel or is it the work of any longshoreman coupled with a few casual but unimportant tasks such as handling lines and pumping bilge water? In the *South Chicago* case the employee's tasks related to navigation were few and 'additional' (p. 255); therefore, he was held not to be a 'seaman'.

The instant case falls under the *South Chicago* decision. The nature of the plaintiffs' work clearly demonstrates that as a matter of fact they are not 'seaman' in any normal meaning of the word. They are not 'naturally and primarily on board' the lighters 'to aid in their navigation' (*South Chicago Co.* v. *Bassett*, *supra*, p. 259). Their work ends at the beginning of the journey or begins at the end of the journey. They have no seaman's papers or nautical training; nor have they any

other specialized training related to the navigation of vessels. True, the floating contrivance upon which they work is considered a vessel and transports the cargo over the short distance intervening between ship and shore. But they are rarely on board during this maneuver and even on the infrequent occasions when they are on board, they have no responsibilities or duties in any way related to the movement except the insignificant task of handling the lines. Although they are charged with the detection of leaks and the pumping of bilge water, their real work begins when the lighter is secured either to the ship or to the dock. The work for which these men are hired and which they chiefly perform is to load and unload cargo; it is not to voyage but to load for the voyage or to unload after the voyage. They perform the combined tasks of foreman of a longshore gang and of pier checker; they hire the longshoremen and check and inspect the cargo. They stand on the side of a dock, direct the work of the longshoremen, connect the cargo to a block and fall and operate the winch hauling the cargo on and off the pier. They supervise the rearrangement of the cargo on the dock or in the lighter. If this work were done while the vessels being loaded were tied to a pier, no one would suggest that the longshoremen should be classified as 'seamen' for the purposes of the Fair Labor Standards Act. It should not alter the case that their winch is fastened to a floating platform and the erstwhile foreman has been dignified by the title 'captain'. Ninety-five per cent of their work remains the same. Clearly, under the *South Chicago* case these trivial 'additional duties' are not enough to convert them into seamen."

POINT III.

Congress did not intend to exclude harbor workers from the benefits of the Fair Labor Standards Act.

Congress exempted seamen from the benefits of the Act. What duties did Congress believe the seamen performed which made it impractical for them to receive the benefits of the Act? It is apparent that Congress thought a seaman is one who has a permanent attachment to his vessel; one who is obliged under the articles which he signs to be employed on a vessel 24 hours a day, seven days a week; one who eats and sleeps aboard the vessel and whose duties, in the main, concerned the navigation of the vessel. Obviously such a person could not very well fit the description of a person who worked 40 hours a week and who was entitled to overtime benefits provided by the Act.

We again adopt the language used by the Administrator in his brief on pages 15 to 24 as our own.

> "The legislative history of Section 13 (a) (3) shows that Congress did not intend to exempt miscellaneous harbor workers such as cargo workers from the coverage of the Act.
>
> The original Black-Connery bill made no exception for seamen. At the Joint Hearings before the Senate and House Committees on Labor, however, it was pointed out that Congress had already provided legislation regulating the wages or hours of various special groups of workers. Evidently, this convinced the Committee that the introduction of new legislation into these already occupied fields

would cause hopeless confusion; for the Committee proposed various amendments, which were later adopted, excluding from coverage of the Act, each group of workers whose wages or hours was already covered by special legislation. The Committee's policy was to mold the exemptions in such a way as to avoid conflicting regulations; so far as appears it had no intention of going farther and exempting employees not belonging to the group which theretofore received adequate protection. Thus, Senator Black explained on the floor (81 Cong. Rec. 7875):

Mr. President, it was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such a way as not to conflict with such regulation. That action was taken with reference to maritime workers. It was taken with reference to railroad workers insofar as they were governed by the Hours of Service Act.

The amendment of the Senator from New Jersey would apply the same principles to truck drivers insofar as hours of labor are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently. * * * Speaking for myself I do not object to the amendment.

The legislative history shows with particularity that the Section 13 (a) (3) exemption was developed in this manner. Prior to consideration of the Fair Labor Standards Act, Congress had enacted the Merchant Marine Act of 1936, Section 301 (a) of which provided:

SEC. 301 (a). The Commission is authorized and directed to investigate the employment and wage conditions in oceangoing shipping and, after making such investigation and after appropriate hearings, to incorporate in the contracts authorized under Titles VI and VII of this Act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy. * * *

This provision was hailed as basic legislation protecting the wages, hours, and working conditions of seamen. The original Black-Connery bill, nevertheless, was drafted in such a way as to cover all maritime workers engaged in commerce, thus creating the threat of conflict between the regulation of the wages and hours of seamen under the Fair Labor Standards Act and their regulation by the Maritime Commission. When the Black-Connery bill was in committee, therefore, the two chief labor organizations representing seamen called the Committees attention to the Merchant Marine Act and expressed a strong desire, that the bill should be amended to exempt 'seamen' and avoid any interference with the prior legislation. Thus, the Sailors Union of the Pacific wrote (Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pp. 1216, 1217):

Further attention is called to title III, section 301, of the Merchant Marine Act of 1936, wherein the Maritime Marine Act of 1936, where-

in the Maritime Commission is empowered to perform, for subsidized vessels of the United States Merchant Marine, duties similar to those assigned to the proposed board under H. R. 7200 and S. 2475. The section referred to reads in part:

• • • • • • • • •

Our union does not like to see any further or additional legislation enacted to cover a group of workers already so well covered, which might tend to create some confusion in labor relations, which are now on the road to practical and successful operation.

Therefore, I ask on behalf of the Sailors Union of the Pacific, that the bill be so written as to exclude the seamen from the operation of the provisions of the bill.

Ralph Emerson, legislative representative of the National Maritime Union, also asked that 'seamen' be exempted from the proposed legislation because their wages, hours, and working conditions were already closely regulated by law and were subject to further regulation by the Maritime Commission. He argued that it would be unwise and productive of confusion to introduce new and general legislation into the field, and stated that his union would prefer to continue under the jurisdiction of the Maritime Commission (Id. at 546, 547, 548, 549):

• • • we feel that in a general interpretation of the whole bill that the way has been left open for the proposed Labor Standards Board to have jurisdiction over those classes

of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the jurisdiction of the Government machinery now set up to handle these problems.

• • • • • • • •

As this newly formed Maritime Commission has jurisdiction at present over seamen in regard to wages, working conditions, and manning scale on subsidized merchant ships, and as we have every faith in the ability and competency of the Commission to handle our affairs, we feel that for the present time that that jurisdiction should not be hampered or impaired by any legislation that would be conflicting.

• • • • • • • •

• • • We still feel, as regards the seamen, that they are working under substandard labor conditions, because our wages certainly do not compare with the average mechanic or shore workers, up to now.

• • • • • • • •

What we would like is an interpretation of the bill which would provide a protective clause for the seamen. If it is going to be the interpretation of the bill that transportation workers in general come under the jurisdiction of this Board then we would like to know it. I have never been able to find out yet as to whether the Board is going to have jurisdiction over us.

The Chairman (Senator Black): Do you think it would be unwise to have two boards with jurisdiction over the same group?

Mr. Emerson: Yes, sir.

The Chairman: Which would you prefer?

Mr. Emerson: We would prefer the Maritime Commission.

The Chairman: You would prefer the Maritime Commission?

Mr. Emerson: Yes, sir.

• • • • • • • •

The Chairman: Thank you very much. I might say, so far as I am individually concerned, I believe it would be improper to have a conflict of jurisdiction between two boards. I would not want to have divided jurisdiction. I would want one that had complete authority. I do not believe the bill, as written, covers the seamen, although there may be a question about it.

The Section 13 (a) (3) exemption grew directly from these requests. When the Committee reported the bill, it offered an amendment to exempt 'seamen'. S. 2475, S. Rept. 884, 75th Cong., 1st sess. The amendment was accepted by the Senate. Later Senator Black, who as Chairman of the Committee, had said during Mr. Emerson's testimony that he believed 'it would be improper to have a conflict of jurisdiction between two boards,' stated on the floor in explanation of the amendment (81 Cong. Rec. 7875):

• • • it was the policy of the committee in cases where regulation of hours and wages are given to other governmental agencies to write

the bill in such a way as not to conflict with such regulation. That action was taken with reference to maritime workers.

It is true, of course, that the interpretation which the Administrator has put upon Section 13 (a) (3) does not confine the exemption to workers operating vessels receiving differential subsidies and therefore coming under the jurisdiction of the Maritime Commission. It would be unfair and impracticable to grant the exemption to vessels receiving the subsidy and to deny it to competing vessels which did not. Furthermore, other considerations which we shall mention presently also entered into the determination that 'seamen' should be exempt. Our point is that since the main purpose was to avoid conflict between two agencies by exempting workers subject to the Maritime Commission, the extent of the Maritime Commission's authority must be given great weight in defining the class of workers which is to be exempt. The line drawn by the Administrator between seafaring men whose principal duties are to render 'service aboard a vessel * * * primarily as an aid in the operation of such vessel as a means of transportation,' on the one hand, and miscellaneous harbor workers such as lighter workers, longshoremen, and dredgers on the other, who although they may work on water, have nothing to do with navigation, admirably effectuates this main object of Congress while observing a well recognized line of demarcation. There is not the slightest reason for extending the exemption beyond the general class of navigation workers who man maritime vessels and who for years have been treated as a special group in legislation affecting

their employment relations. Lighter workers loading and unloading cargo, as well as dredge workers, longshoremen, and other harbor workers, are not in the class of navigation workers. They are not protected by other legislation. It would be a travesty to expand the exemption so far beyond the intention of Congress as to deny to them this Act's protection.

The other persuasive reason for the 'seaman's' exemption was the impracticability of regulating the wages and hours of 'seamen' in the manner contemplated by the Fair Labor Standards Act. Most true seamen, i. e., workers navigating transport vessels, must be furnished food and quarters free of charge (46 U. S. C. secs. 80, 564, 713), and for that reason they were opposed to having applied to them general legislation which permitted an employer to include in wages the cost of facilities furnished to his employees (Section 3 (m), Joint Hearings, pp. 548, 549). There is no difficulty, however, in applying the scheme of the Act to the minimum wage paid to plaintiffs. They do not live on board the lighters. They receive an hourly wage, and meals are not supplied by the employer (R., 39, 60). In short, there is no reason why the Act should not apply.

Even more significant is the distinction between seamen and cargo workers such as plaintiffs in respect to hours of work. The seaman's contract binds him to the vessel for the whole voyage and under all conditions and perils of the sea. During the voyage these men are on board at all times and are constantly subject to call in the case of an emergency. 'Under the best of conditions in the maritime industry as affecting seamen it is

impossible at the present time for us to work less than 56 hours per week' (Joint Hearings, *supra*, p. 548). Similar requirements exist as to workers who are continuously engaged in navigating barges and other vessels plying the inland waterways. The objective of the Fair Labor Standards Act to limit the workweek to 40 hours could not possibly have reached its mark in any of these stiuations. *Cf. Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134. 'To restrict their employment to a week would greatly interfere with the operation of such means of transportation' (*Gale* v. *Union Bag & Paper Corp.*, *supra*, p. 28). This circumstance alone was a strong reason for exempting seamen from the general legislation. See *Helena-Glendale Ferry Co.* v. *Walling*, 132 F. (2d) 616, 619 (C. C. A. 8).

This reason, however, does not apply to a worker engaged in facilitating the loading and discharging of cargo by means of a water-borne winch. His main task is not that of a seaman. It is merely the performance of a duty 'that formerly was ordinarily done by the crew, not upon the high seas, but at the ship's destination, minus the perils of the sea. He does not undergo the hardships and dangers, nor does he surrender the personal rights and liberties that a seaman does in binding himself to the vessel as a member of its crew * * *' *Flanagan* v. *Carken*, 11 S. W. (2d) 392, 394 (Tex. Civ. App.). Unlike seamen, who are paid monthly, plaintiffs since at least the year 1938 have been paid an hourly wage and have received time and a half their regular rate for all hours over eight per day. Since they work six days each week, the sole issue is whether they

should receive premium pay for time over 40 hours rather than for time over their current schedule of 48 hours. Thus, even before the Fair Labor Standards Act, maximum hour regulations of the precise kind as those embodied in the Act were voluntarily applied to the work of the plaintiffs. Surely, Congress could not have anticipated any regulatory difficulties in this situation and could not have intended the exemptive amendment designed to avoid these difficulties to apply to these men."

POINT IV.

The decision of the Circuit Court of Appeals was not a final adjudication. It reversed the District Court's finding that the respondents were seamen.

On the motion of the petitioner, the District Court held that the respondents were seamen and granted summary judgment in favor of the petitioner. No trial of the issues was had.

The Circuit Court's decision reversed the finding of the District Court that the respondents were seamen and remanded the case for trial. The petitioner is not deprived of a trial or prevented from offering proof pertinent to the issues. The Circuit Court's decision, aside from reversing the District Court's finding, restates the law as expressed by this Court.

The District Court was not justified on the papers submitted to it in holding as a matter of law that the respondents were seamen. We believe that the application for a writ is premature. A trial should first be had

and thereafter if any of the parties feel aggrieved, the complete record can be reviewed and the law applied to the proven facts. In the case of *South Chicago* v. *Bassett*, 309 U. S. page 251, the Court at page 258 stated:

> "Petitioners urge that the question whether the decedent was a member of the crew was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of the crew as distinguished from a longshoreman or a laborer at work upon the vessel. We are unable so to conclude."

In the case of *Puget Sound Freight Line* v. *Marshal*, 125 Fed. Report 2d, the Court at page 878 stated:

> "There has not yet been formulated a precise statement from which it can at once be determined just when an employee is a member of the crew and when he is a harbor worker; and therefore his classification must be determined by the circumstances of his own individual case * * * because there is no conflict in the evidence appellants seek to have the class status settled as a matter of law."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ABRAHAM M. FISCH,

ISIDOR ENSELMAN,

Counsel for Respondents.

APPENDIX

The following is the complete statement on the seamen's exemption made by Ralph Emerson, legislative representative of the National Maritime Union, in the hearings on the Fair Labor Standards Act before the Joint Congressional Committees (Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pp. 544-549):

The Chairman: Mr. Emerson, we have you listed as the legislative representative of the National Maritime Union.

Mr. Emerson: Yes, sir.

The Chairman: All right, you may proceed.

Mr. Emerson: Mr. Chairman and gentlemen, my name is Ralph Emerson. I am the legislative representative of the National Maritime Union of America, comprising a membership of over 50,000 merchant seamen of the Atlantic and Gulf coasts.

I am also appearing here on behalf of the American Radio Telegraphists Association.

In appearing on behalf of the seamen it is not our intent to go into a detailed analysis of this proposed legislation. The seamen are heartily in accord with the general provisions of this bill, but we feel that some tightening up is needed of some of the clauses, so that their intent will be made more specific. Interpretation of the bill in its present form would give the proposed Labor Standards Board general wide powers in regard to all labor.

At this point I would like to introduce in the record a resolution passed by our union:

> Whereas the general purpose of the Black-Connery bill, embodying President Roosevelt's wage-and-hour program, are good ones:
>
> *Be it resolved by the Deck and Engine and Stewards Division of the National Maritime Union in the port of New York,* That we support S. 2475 and H. R. 7200, the Black-Connery bill, with the following changes and amendments:

They are short amendments, and I will list them.

On page 4 of S. 2475, in subsection (8), that this subsection be amended to exclude the words "employee representation committee or plan." We feel that the inclusion of those words would legalize company unions.

Representative Connery: May I interrupt you there? In my bill I struck that out—in the Connery bill.

Mr. Emerson: I am reading from S. 2475.

Representative Connery: The Senate bill?

Mr. Emerson: Yes.

Representative Connery: I intended to confer with the Senator on that before it slipped my mind. I do not know what the Senator's attitude is, but I think it will probably go out of his bill, too.

Mr. Emerson: Yes. Now, on page 6, line 5, that the exceptions under the definition of "strikebreaker" be omitted; and we would like those exceptions omitted, since we feel, then, as regards the maritime industry, that ship scabs would not be included in the term. That is the way they have it listed there. In other

words, in case of a strike that the shipping interests could not use scabs in place of union labor.

Now, on page 14, that is clause (3)—and it is both on pages 14 and 16—in clause (3), that the word "primarily" be inserted after "consider".

Representative Connery: Where is that? What page?

Mr. Emerson: That is page 14.

The Chairman: Lines 19 and 20.

Mr. Emerson: Lines 19 and 20. We would like the word "primarily" inserted there, so that union contracts shall provide the minimum wage and hour standards.

On page 19, lines 14 to 17, inclusive, that this section be omitted in the case of the seamen, or that provision be made to give us protection, since the steamship owners could then deduct from our wages for our meals and sleeping quarters.

Of course, as you know, in the maritime industry, in the case of the seamen specifically, that at sea we have no choice but to accept from the company meals and sleeping quarters along with our wages. It would be impossible to have a different set-up in that case, but we feel the interpretation of this bill in its present form might discriminate against us.

The Chairman: I would just like to ask a question in that connection. I would like to make this clear: Do the seamen now get their board and lodging as a part of the pay or do they fix their wage scale exclusive of the board and lodging?

Mr. Emerson: Well, there has never been any specific rule for that except it has always been included,

because our standard of wages has been so far below other standards; naturally we have had to have our board and lodging, and no deductions have ever been made for it.

Now, on page 29, line 6, that the words "as far as practicable" be struck out, so that the advisory committee will have union men only representing labor.

That is the extent of the amendments offered by this resolution passed at the meeting in New York.

I have a few further recommendations to make from the general membership, which are included in my statement.

While there is no doubt in our minds that the intent of the bill is to raise labor standards to a fair level, and while it is also the intent of this bill to raise those standards among workers in mills, factories, and other branches of industry which could be classed as productive, we feel that in a general interpretation of the whole bill that the way has been left open for the proposed Labor Standards Board to have jurisdiction over those classes of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the jurisdiction of the Government machinery now set up to handle these problems.

On page 3, of S. 2475, section 2, subsection (2), lines 9 to 12 "'interstate commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof or within the District of Columbia." Now, our interpretation of the words "and any place outside thereof" would imply that this means foreign

commerce, and this would, of course, include all carriers by water and the employees of such carriers. Also all commerce carried interstate by water would affect the coastwise shipping lines and their employees. If it is not the intent of this proposed legislation to place this interpretation upon this bill, then it would not so vitally affect the seamen. I think it would be in order for a legal interpretation to be given this paragraph so that our position could be defined definitely. If it is the intent of this bill that the proposed Labor Standards Board shall have jurisdiction over all labor and all industry, then we would find it necesary to offer the following amendment:

This amendment would be in the nature of an addition. I refer to page 40, section 22, and this would be a new paragraph (c). It would read as follows:

> That no provision of this act or of any regulation or order thereunder shall supersede or in any manner revoke or impair the present jurisdiction of the Maritime Commission over merchant seamen as defined in Public Act No. 835, Seventy-fourth Congress, title III, section 301: "*Provided, however,* That this shall not prevent the Labor Standards Board from establishing a minimum fair wage and a maximum workweek standard for merchant seamen which will be higher than that standard established by the Maritime Commission."

Representative Connery: May I interrupt you there?

Mr. Emerson: Yes, sir.

Representative Connery: Did you read section 22 on page 39, which reads:

> No provision of this act or of any regulation or order thereunder shall supersede, or justify noncompliance with any Federal or State law or municipal ordinance regulating or prohibiting the employment of minors or establishing a minimum wage higher than a minimum wage established under this act or a maximum work-week lower than a maximum work-week established under this act, or otherwise regulating the conditions of employment in any occupation and not in conflict with a provision of this act or a regulation or order thereunder.

Mr. Emerson: That is right.

Representative Connery: In other words, your Maritime Commission would be taken care of there.

Mr. Emerson: Well, I have taken this matter of the interpretation of this bill up with several people and they seem to think that the proposed Labor Standards Board well might have jurisdiction in this case.

Representative Connery: Under these bills they cannot interfere with any law which sets a shorter work-week or higher minimum wage.

Representative Thomas: Does the Maritime Act attempt in any way to regulate hours and wages?

Mr. Emerson: It is a small section of the act that refers to the Maritime Commission's jurisdiction over merchant seamen. This is from the Merchant Marine Act of 1936:

> The Commission is authorized and directed to investigate the employment and wage conditions in oceangoing shipping and, after making such investigation and after appropriate hearings to

incorporate in the contracts authorized under titles VI and VII of this act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy.

Representative Thomas: Thank you.

The Chairman: I did not quite get the recommendation with reference to that. Would your organization prefer to continue under the Maritime Commission rather than to be included in this law? Have your seamen any position on that?

Mr. Emerson: The position is—some people might say we want our cake and we want to eat it at the same time because while we want to go along under the jurisdiction of the Maritime Commission we feel, however, if the Labor Standards Board established a higher standard, then we would like to get any benefits which might accrue from this, although we feel that the Maritime Commission is going to do a good job as regards the merchant marine.

Representative Connery: In other words, you want double protection.

Mr. Emerson: This is simply a protective clause; yes, sir.

As this newly formed Maritime Commission has jurisdiction at present, over seamen in regard to wages, working conditions, and manning scale on subsidized merchant ships, and as we have every faith in the ability and competency of the Commission to handle our affairs, we feel that for the present time that that jurisdiction should not be hampered or impaired by any

legislation that would be conflicting. However, we do not care to isolate ourselves from any benefits which could be accrued by this bill. As it is only in the recent past that the seamen, through organized efforts, have managed to have their standards of wages and living conditions raised, we feel that on page 12, part 2, section 4, paragraph (c) that caution should be observed by this committee in giving the proposed board the power to lower labor standards so that in no case should those standards be lowered to an extent that would deprive us to the gains we have already made. In fact the seamen feel that any revision of wage scales for the maritime workers for some time to come should be upward as we have long been amongst that class of workers who were underpaid and overworked.

Now, I would like to say something in regard to the maximum work-week. Under the best of union conditions in the maritime industry as affecting the seamen it is impossible at the present time for us to work less than 56 hours a week. At sea we cannot stop work and just say, "Well, this is a holiday," because we have to keep on working at the rate of an 8-hour day, 7 days a week, and that certainly makes 56 hours, but with the minimum of even 40 hours I think satisfactory arrangement could be made whereby the other extra 16 hours could be considered as overtime, and with the wages of the maritime workers at the low standards, as they have always been, I do not think we would be getting any too much money in regard to wages, because we have always been underpaid.

As I say, it has only been recently, in the last year or two, that we have started to raise our standards. We still feel, as regards the seamen, that they are working under substandard labor conditions, because our wages certainly do not compare with the average

mechanic or shore worker, up to now.

In the matter of establishing a definite standard of a minimum wage and a maximum work-week, many advantages could accrue through this for the workers in certain industries, but then again this might not always apply to the workers in industry who have long-established and well-organized trade unions. It has always been the policy of the employer in industry where minimum wages have been established to keep the employees' wages down on a level as near the minimum as possible.

Now, on page 19, lines 14 to 17, inclusive, it states:

> Deductions for board, lodging, and other facilities furnished by the employer, if the nature of the work is such that the employer is obliged to furnish and the employee to accept such facilities.

Great care should be observed to minimize the activities of employers in sponsoring the use of "company house" and "company stores" where this situation is really unnecessary. This situation was brought out clearly before the La Follette Committee hearings in the case of the mine operators in Harlan County, Ky.

In that respect, it was shown clearly there that many of the workers were paid off in scrip and if they wanted cash for the scrip 20 per cent was deducted.

Also, many times, at the end of the week, by the time that the man had bought his supplies for the week at the company store, at the high rates prevailing there, that he had nothing left, that he used all his earnings to keep his family in existence, in groceries, and so forth. But, of course, that does not effect us only as regards the provision as I stated before.

As I say, we are in a position where we have to accept board and lodging, and an interpretation of this clause here gives the employer in the maritime industry the right to deduct for board and lodging.

Representative Connery: Pardon me. You notice that is not mandatory on the Board, the Board "may" do it, depending on the conditions.

Mr. Emerson: What we would like is an interpretation of the bill which would provide a protective clause for the seamen. If it is going to be the interpretation of the bill that transportation workers in general come under the jurisdiction of this Board then we would like to know it. I have never been able to find out yet as to whether the Board is going to have jurisdiction over us.

The Chairman: Do you not think it would be unwise to have two boards with jurisdiction over the same group?

Mr. Emerson: Yes, sir.

The Chairman: Which would you prefer?

Mr. Emerson: We would prefer the Maritime Commission.

The Chairman: You would prefer the Maritime Commission?

Mr. Emerson: Yes, sir.

Representative Ramspeck: Mr. Emerson, getting back to this board and lodging, if you were charged for the board and lodging on the ships, of course you would want higher wages than you have now?

Mr. Emerson: That is absolutely necessary. If we had to pay for board and lodging we would have practically nothing left.

Representative Connery: Right there your idea is that board and lodging is one thing, do you not?

Mr. Emerson: Yes, sir.

Representative Connery: You bargain for that for a starter, that you get decent food, and then after that your wage scale is entirely separate?

Mr. Emerson: Entirely separate. You see, it would be impossible to do otherwise. We have to accept it.

In regard to the use of child labor, the seamen have always felt that this evil should be corrected and we believe that the inclusion of this problem in this bill is proper and fitting and should be made an integral part of this proposed legislation if it is enacted into law. In general, we feel that with a tightening up of various parts of this proposed bill and its enactment into law, that not only would labor have much to gain, but that in time industry as a whole in this country would be favorably affected.

That is all I have to say, gentlemen.

The Chairman: Thank you very much. I might say, so far as I am individually concerned, I believe it would be improper to have a conflict or jurisdiction between two boards. I would not want to have divided jurisdiction. I would want one that had complete authority. I do not believe that bill, as written, covers the seamen, although there may be a question about it.

Mr. Emerson: Well, that interpretation of "interstate commerce" would certainly take in the carriers in interstate commerce and their employees.

The Chairman: Thank you.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 121

MANHATTAN LIGHTERAGE CORPORATION, PETITIONER

v.

ERNEST ANDERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

STATEMENT

This suit was brought to recover overtime compensation, liquidated damages, and attorney's fees under Section 16 (b) of the Fair Labor Standards Act. The sole question involved is whether respondents are seamen within the scope of Section 13 (a) (3) of the Act which exempts from the minimum wage and overtime provisions "any employee employed as a seaman."

Respondents are employed in New York Harbor as "captains" of lighters owned and operated

by petitioner in its business of lightering cargo between ships and between ship and shore. The lighters have no motive power of their own but must be towed from ship to ship or from pier to pier. (R. 21.) Occasionally they may be moved short distances by means of ropes wound by respondents on a capstan or winch. The respondents' work is almost entirely confined to duties similar to those of longshoremen in loading and unloading ships. The duties of respondent Ernest Anderson are typical and are set forth in an affidavit printed in respondents' Brief in Opposition,[1] which may be summarized as follows.

Each morning Anderson selects a gang of longshoremen to work with him on his lighter for that day. The group load and unload vessels, working in the same manner as if they had been hired to work ashore. Anderson's job in connection with the loading and unloading activities is to operate the winch lifting and lowering the cargo hooked onto a block and fall, a job exactly like that of the winchman in the longshoreman's gang working on shore.

Anderson's shore duties, in addition to hiring and paying his labor gang, include checking the

[1] Pp. 5–8. A stipulation printed at p. 39 of the record permits reference to affidavits and depositions of the respondents. The testimony of other respondents, not differing materially from Anderson's affidavit, is set forth in an appendix to appellee's brief in the Circuit Court of Appeals to which reference is made in its petition.

cargo on the dock against the cargo list for the purpose of identifying those items which are to be loaded and examining the cargo in order to determine its condition at the time of receipt. The foregoing activities, which are in all respects similar to the work of a longshoreman, occupy about 95 percent of Anderson's work time.

Anderson's nautical duties, on the other hand, are negligible. Petitioner's lighters are towed by tugboats. The tug crew generally takes charge of navigation. Respondent Anderson checks the tie lines securing the lighter to the dock or ship at the end of the day, reports any damage to the lighter, and detects any leaks. As an incident to the operation of the hoist, Anderson pumps out bilge water. He is in no way responsible, however, for the movement of the lighter to and from the dock. As a general rule he is not even on board during a tow, for the towing is usually done at night after he has gone home. On the few occasions each month on which it is necessary to move the lighter during working hours, Anderson stays on board, but he has no duties with respect to navigation. On such occasions Anderson's only activity is to help with the tow lines when the tug crew requests.

Although some of the barge captains occasionally eat, sleep, or cook aboard a lighter under unusual circumstances (Pet. 5), Anderson has not done so. He is not required to have a

seaman's rating. Deductions are made from his wages in accordance with the requirements of the Social Security Act and in addition he is entitled to unemployment insurance benefits. Anderson works eight hours per day at an hourly rate, receives one and one-half times this rate for daily hours in excess of eight and for work on Sunday, and is regularly employed six days each week.

The court below held that respondents were not seamen within the meaning and intent of the exemption from the Act.

ARGUMENT

Petitioner contends that the decision below is in conflict with the decision of the Fifth Circuit in *Gale* v. *Union Bag & Paper Corp.*, 116 F. (2d) 27, certiorari denied, 313 U. S. 559, and that it is inconsistent with this Court's decision in *Norton* v. *Warner Co.*, 321 U. S. 565. We think the decision below is correct and that there is no conflict.

1. The term "seaman," like the term "member of the crew" has various meanings and the correct interpretation must depend on the context in which the word appears. Congress has expressly adopted at least three definitions of "seaman," the application of each of which must be limited to the particular statute in which it ap-

pears.[2] See *Warner* v. *Goltra,* 293 U. S. 155, 160–161. "What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained." *Ibid.,* 293 U. S. at 158.

The decision below follows the Administrator's interpretation that the term "seaman" as used in Section 13 (a) (3) refers to one who performs aboard a vessel "service which is rendered primarily as an aid in the operation of such vessel

[2] The definition applicable to some of the Shipping Commissioners' Acts (Section 65 of the Act of June 7, 1872, c. 322, 17 Stat. 277, now 46 U. S. C. 713) provides: "That to avoid doubt in the construction of this act, every person having the command of any ship belonging to any citizen of the United States shall, within the meaning and for the purposes of this act, be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman' within the meaning and for the purpose of this act * * *."

In the immigration laws a seaman is defined: "The term 'seaman' shall include every person signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place." Act of Feb. 5, 1917, c. 29, secs. 1, 37, 39 Stat. 874, 897, 8 U. S. C. 173.

In the public health laws, the term is defined: "The term 'seaman' * * * shall be held to include any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation." Act of 1875, c. 156, sec. 3, 18 Stat. 485, as amended, 24 U. S. C. 1.

as a means of transportation, provided he performs no substantial amount of work of a different character," and that "loading and unloading and activities relative thereto" are nonexempt work. See Interpretative Bulletin No. 11, July 1939, revised July 1943, paragraphs 3, 6.[3] Admittedly this construction of the word "seaman" does not include all workers who have been held to be seamen within the meaning of the term as used in other contexts and in other statutes having different purposes. But it includes all maritime workers whose exemption is required in order to give effect to the purposes and reasons Congress had in mind in providing the exemption and at the same time does not deny the protection of the Act to workers to whom such purposes and reasons have no application.

The legislative history of Section 13 (a) (3) shows that Congress did not intend to exempt miscellaneous harbor workers such as cargo workers from the coverage of the Act, but that the exemption had three purposes: (1) To avoid conflict between the Fair Labor Standards Act and regulations adopted by the Maritime Commission; (2) to avoid the impracticable task of compelling maritime employers and employees to adjust their special arrangements concerning wages, food, and quarters to the requirements of general minimum wage legislation; and (3) to exempt those mari-

[3] The pertinent sections of the bulletin are printed in Appendix A, *infra*, pp. 18–21.

time workers to whom the overtime provision could not reasonably be applied under conditions prevailing in the operation of vessels.

The main purpose of the exemption was to avoid conflict between two sets of government regulations by exempting those workers whose wages and hours are subject to control by the Maritime Commission under the Merchant Marine Act of 1936.[4] The original Black-Connery bill was drafted in such a way as to cover all maritime workers engaged in commerce. When the bill was in committee, therefore, the two chief labor organizations representing seamen called the Committee's attention to the Merchant Marine Act and expressed a strong desire that the bill should be amended to exempt "seamen" to avoid any interference with the prior legislation. (See letter of the Sailors Union of the Pacific, Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st sess., pp. 1216, 1217. See also statement of Ralph Emerson,

[4] Act of June 29, 1936, c. 858, sec. 301, 49 Stat. 1992, 46 U. S. C., sec. 1131 (a). Sec. 301 (a) of this Act provided: "The Commission is authorized and directed to investigate the employment and wage conditions in ocean-going shipping and, after making such investigation and after appropriate hearings, to incorporate in the contracts authorized under titles VI and VII of this Act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy. * * *"

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legislative representative of the National Maritime Union (*id.* at 546, 547, 548, 549).)[5]

The Section 13 (a) (3) exemption grew directly from the requests of these union representatives. When the committee reported the bill, it offered an amendment to exempt "seamen." S. 2475, S. Rept. 884, 75th Cong., 1st sess. The amendment was accepted by the Senate. Later Senator Black, who as Chairman of the Committee had said during Mr. Emerson's testimony that he believed "it would be improper to have a conflict of jurisdiction between two boards," stated on the floor in explanation of the amendment (81 Cong. Rec. 7875):

> * * * it was the policy of the committee in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation. That action was taken with reference to maritime workers.

There is no reason for extending the exemption beyond the general class of navigation workers who man maritime vessels and who for years have been treated as a special group in legislation affecting their employment relations.[6] Lighter

[5] The pertinent portions of Mr. Emerson's statements are printed in Appendix B, *infra*, pp. 22–26.

[6] The interpretation which the Administrator has put upon Section 13 (a) (3) does not confine the exemption to workers operating vessels receiving differential subsidies and therefore coming under the particular legislation which de-

workers loading and unloading cargo, as well as dredge workers, longshoremen, and other harbor workers, are not in that class of navigation workers. They are not protected by other wages and hours legislation.

The second reason for the "seaman's" exemption was the impracticability of regulating the wages of seamen in the manner contemplated in the Fair Labor Standards Act. Most actual seamen, i. e., workers navigating transport vessels, must be furnished food and quarters free of charge (46 U. S. C. secs. 80, 564, 713), and for that reason they were opposed to having applied to them general legislation which permitted an employer to include in wages the cost of facilities furnished to his employees (Section 3 (m) of the Act, 29 U. S. C. 203 (m). See Joint Hearings, pp. 548, 549, Appendix B, *infra*, pp. 25–26).[7] There is no

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fines the jurisdiction of the Maritime Commission. It would be unfair and impracticable to apply the exemption to vessels receiving the subsidy and not to competing vessels which did not. Furthermore, other consideration also entered into the determination that "seamen" should be exempt. Since, however, one purpose was to avoid conflict of authority by exempting workers subject to the Maritime Commission, the extent of the Maritime Commission's authority should be given great weight in determining the scope of the exempt class of workers.

[7] There are, of course, other services and accommodations of value—e. g., maintenance and cure—reflected in the wages paid to true seamen, as the term is herein used. These are supplied by the shipowner in accordance both with the general maritime law and with statute. See 46 U. S. C. 563, 564, 591–600, 622, 670, 673. These maritime laws do not extend

difficulty, however, in applying the scheme of the Act to the minimum wage paid to respondents. They do not live on board the lighters. They receive an hourly wage, and meals are not supplied by the employer.

The third reason for the exemption—the impracticability of regulating the hours of transport seamen—lends even greater support to a distinction between seamen and cargo workers such as respondents. The seaman's contract binds him to the vessel for the whole voyage and under all conditions and perils of the sea. During the voyage these men are on board at all times and are constantly subject to call in case of emergency. "Under the best of union conditions in the maritime industry as affecting the seamen it is impossible at the present time for us to work less than 56 hours a week" (Appendix B, *infra*, at p. 25). Similar requirements exist as to workers who are continuously engaged in navigating barges and other vessels plying the inland waterways. The objective of the Fair Labor Standards Act to attain a workweek limited to 40 hours could not feasibly have reached its mark in any of these situations. Cf. *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134. "To restrict their employment to a week of 44 hours and ultimately to 40 hours per week would greatly interfere with the operation of such means

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to the class of maritime workers marked out by the Administrator as nonexempt.

of transportation" (*Gale* v. *Union Bag & Paper Corp., supra,* p. 28). This circumstance alone was a strong reason for exempting seamen from the general legislation. See *Helena Glendale Ferry Co.* v. *Walling,* 132 F. (2d) 616, 619 (C. C. A. 8).

This reason, however, does not apply to a worker engaged in facilitating the loading and discharging of cargo by means of a water-borne winch. His main task is not that of a seaman. It is merely the performance of a duty "that formerly was ordinarily done by the crew, not upon the high sea, but at the ship's destination, minus the perils of the sea. He does not undergo the hardships and dangers, nor does he surrender the personal rights and liberties that a seaman does in binding himself to the vessel as a member of its crew * * *." *Flannagan & Sons* v. *Carken,* 11 S. W. (2d) 392, 394 (Tex. Civ. App.). Unlike seamen, who are paid by the month, respondents since at least the year 1938 have been paid an hourly wage and have received one and one-half times their regular rate for all hours over eight per day. Even before the Fair Labor Standards Act, maximum hour arrangements not unlike those embodied in the Act were voluntarily applied to the work of the respondents. The conditions of these men do not present the regulatory difficulties which the exemption was designed to avoid.

To effect the three purposes of the seaman's exception requires the exemption of workers who

serve on board vessels primarily to aid in their operation as means of transportation, and no others. Correlatively, all three purposes can be accomplished without exempting workers engaged primarily in loading and unloading vessels. Respondents are not subject to the jurisdiction of the Maritime Commission. They are paid an hourly wage and do not receive meals or, unless under exceptional circumstances, any quarters or lodging. They already receive overtime compensation under contractual arrangements which may practically be brought into accord with those required by the Fair Labor Standards Act. The line between those who are exempt and those who are nonexempt has been drawn by the Administrator and applied by the court below in such a way as to achieve the three purposes of the exemption and at the same time to grant the protection of the Act to employees like respondents who require such protection and can be accorded it without practical difficulty. The established rule of strict construction of exemptions from a remedial statute of this character forbids extending the exemption any farther. See *Phillips* v. *Walling*, No. 608, October Term, 1944, decided March 26, 1945, pp. 2–3 of slip opinion; *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. (2) 346 (C. C. A. 1), and *Walling* v. *Great Lakes Dredge & Dock Co.*, 149 F. (2d) 9 (C. C. A. 7).

The line of demarcation between seamen and non-seamen which the Administrator and the court below have followed, although adapted to the requirements of the specific situation, is not original nor unusual, but follows a line established by the decisions of this Court in analogous cases. In *Norton* v. *Warner Co.*, 321 U. S. 565, on which petitioner relied (Pet. 14–15), the employee received a monthly salary and lived, ate, and slept on his barge. He set out the navigation lights, pumped water, repaired leaks during the voyage, had active and continual care of the tow lines, and performed other tasks related to the movement of the barge in transportation. He "had no duties in connection with the handling of the cargo and no shore duties" (p. 568). He was held to be a "member of the crew," and therefore a "seaman" (entitled to redress for injuries as such rather than to compensation under the Longshoremen's and Harbor Workers' Act), because he "was naturally and primarily on board the vessel to aid in her navigation" (p. 572). *South Chicago Co.* v. *Bassett,* 309 U. S. 251, makes it clear that a different conclusion follows where the primary duties relate not to navigation but to loading and unloading and activities characteristic of shore duties. A deck hand on a lighter whose duties were concerned chiefly with loading and unloading and "did not pertain to

navigation aside from the incidental task of throwing the ship's rope or making the ship fast" was held not to be a "member of the crew" but "may appropriately be regarded as in the position of longshoremen or other casual workers on the water" (p. 260).[8] The test which the Administrator would apply here is identical.

It is not material that the *South Chicago* and *Norton* cases deal with the phrase "member of the crew" rather than with the term "seaman." We do not cite these cases as controlling precedents but as illustrations of the line of demarcation which will give effect to the purposes of the exemption and at the same time carry out the broad remedial policies of the Fair Labor Standards Act.

2. There is no conflict among the circuits on the question here involved. The decision of the Fifth Circuit in *Gale* v. *Union Bag & Paper Corp.*, 116 F. (2d) 27, involved quite different

[8] Cf. *Beddoo* v. *Smoot Sand & Gravel Corp.*, 128 F. (2d) 608 (App. D. C.), which held that an employee on a river dredge whose main task was to coal up the dredge from a scow was not a member of the crew. Accord: *Andersen* v. *Olympian Dredging Co.*, 57 F. Supp. 827 (N. D. Calif); *Puget Sound Bridge & Dredging Co.* v. *State Unemployment Compensation Comm.*, 168 Ore. 614, 126 P. (2d) 37; *Grant Contracting Co.* v. *Murphy*, 387 Ill. 137, 56 N. E. (2d) 313; *Shore Fishery, Inc.* v. *Board of Review*, 127 N. J. L. 87, 21 A. (2d) 634. *Contra: Kibadeaux* v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5).

facts. The barge tenders held to be seamen in the *Gale* case were engaged primarily, if not exclusively, in aiding the operation of barges as means of transportation under the command of a tug captain. The court based its decision on the ground that the bargemen's duties were essentially related to the transportation or the voyage, as distinguished from such non-nautical work as loading and unloading cargo. According to the findings of fact in the *Gale* case,[9] the main duties of the bargemen were performed during the actual course of transportation. When the barges were at the landings for loading or unloading, the barge tender's duties were negligible. 30 F. Supp. at 648–649. The circuit court of appeals emphasized the importance of the bargemen's duties while "on a voyage" and that there were "necessary and usual to the navigation of the barges." In short, the bargemen were essentially water transportation employees engaged in moving merchandise over the navigable waters.[10]

[9] See *Lowrimoore* v. *Union Bag & Paper Corp.*, 30 F. Supp. 647 (S. D. Ga.), referred to by the circuit court of appeals in the *Gale* opinion, 116 F. (2d) at p. 27.

[10] Following the Fifth Circuit's decision in the *Gale* case, the Administrator revised his Interpretative Bulletin so as to recognize the applicability of the exemption to barge tenders performing the normal duties "necessary and usual to the navigation of barges * * * unless they do a substantial amount of nonexempt work." See Interpretative Bulletin No. 11, as revised July 1943, paragraph 6, *infra*, at p. 20.

No circuit court of appeals has held the exemption applicable to workers engaged essentially in shore or harbor duties as distinguished from navigation or transportation duties. The two other circuits which have ruled on the question are in agreement with the decision below and with the Administrator's interpretation that, for the purpose of this particular statute, the term "seaman" is limited to workers engaged essentially in navigation or water transportation duties. *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. (2d) 346 (C. C. A. 1); *Walling* v. *Great Lakes Dredge & Dock Co.*, 149 F. (2d) 9 (C. C. A. 7). In both of these cases, workers on non-self-propelled dredges, engaged in dredging mud and other material from the bottom of rivers, creeks, and harbors, were held outside the scope of the exemption on the grounds that "their work was essentially connected with excavation and not with navigation" (*Bay State Dredging & Contracting Co.* case, 149 F. (2d) at p. 349), and that their services were more like the services of longshoremen and harbor workers and thus distinguishable from those of employees "on the vessel who are naturally and primarily on board to aid in her navigation" (*Great Lakes Dredge & Dock Co.* case, 149 F. (2d) at p. 11).

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

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AUGUST 1945.

APPENDIX A

INTERPRETATIVE BULLETIN NO. 11—SEAMEN EXEMPTION

The Scope and Applicability of the Exemption Provided by Section 13 (a) (3) of the Fair Labor Standards Act of 1938. July 1943.[1] United States Department of Labor, Wage and Hour and Public Contracts Divisions, Office of the Administrator.

1. Section 13 (a) (3) of the act provides an exemption from the minimum wage provisions of section 6 and the maximum hours provisions of section 7, as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed as a seaman * * *.

2. The provisions of sections 6 and 7 of the act apply only to "employees * * * engaged in (interstate) commerce or in the production of goods for (interstate) commerce." See Interpretative Bulletins Nos. 1 and 5. This bulletin will not deal with the question as to which "seamen" are so engaged, but will be directed solely to the scope of the exemption in section 13 (a) (3) This bulletin is intended to indicate the construction of this section which will guide the Administrator in the performance of his adminis-

[1] Originally issued July 1939. Paragraph 6 revised July 1943.

trative duties unless directed otherwise by the authoritative ruling of the courts, or unless he shall subsequently decide that his prior interpretation is incorrect.

3. An employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. In our opinion, this exemption extends to employees performing such service on vessels navigating inland waters as well as on ocean-going and coastwise vessels.

4. The exemption extends to members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in the preceding paragraph. However, concessionaires and their employees aboard a vessel ordinarily do not perform service subject to the authority, direction, and control of the master of the vessel except incidentally and do not come within the exemption under discussion.

5. The exemption does not extend to employees working aboard vessels whose service is not rendered primarily as an aid in the operation of the vessel as a means of transportation. Thus employees on floating equipment who are engaged in the construction of docks, levees, revetments, or other structures, and employees engaged in dredging operations or in the digging or processing of

sand, gravel, or other materials are not employed as "seamen." For the same and other reasons, stevedores and longshoremen are not regarded as "seamen." Similarly, stevedores or roustabouts traveling aboard a vessel from port to port whose principal duties require them to load and unload the vessel in port would not themselves come within the exemption even though during the voyage they may perform from time to time certain services of the same type as those rendered by other employees who would be regarded as seamen under the act. However, an employee employed as a seaman would not be outside the exemption simply because, as an incident to that employment, he assists in the loading or unloading of baggage or freight at the beginning or end of a voyage.

6. Barge tenders on non-self-propelled barges who perform the normal duties of their occupation, such as attending to the lines and anchors, putting out running and mooring lines, pumping out bilge water, and other similar activities necessary and usual to the navigation of barges, are considered seamen within the exemption unless they do a substantial amount of nonexempt work. Loading and unloading and activities relative thereto will be considered nonexempt work. Employees on seagoing barges would also seem to be employed as seamen.

7. Various situations are presented with respect to employees rendering watchman or similar service aboard a vessel in port. Where such services are rendered by members of the crew during a temporary stay in port or during a brief lay-up for minor repairs such employees would be within

the exemption. Where the vessel is laid up for a considerable period members of the crew rendering watchman or similar service aboard the vessel would not appear to be within the exemption because their services are not rendered primarily as an aid in the operation of the vessel as a means of transportation. Furthermore, employees who are furnished by independent contractors to perform watchman or similar service aboard a vessel while in port would not be employed as "seamen," regardless of the period of time the vessel is in port, since their services are not of the type described in paragraph 3 above. The same considerations would apply in the case of a temporary or skeleton crew hired to maintain the vessel while in port so that the regular crew may be granted shore leave.

8. Section 13 (a) (5), which provides an exemption from both the wage-and-hour provisions for employees engaged in certain operations in the sea-food and fishery industry, is discussed in Interpretative Bulletin No. 12. In addition, attention is directed to section 13 (b) (2) of the act, which provides an exemption from the maximum hour provisions for "any employee of an employer subject to the provisions of part I of the Interstate Commerce Act."

APPENDIX B

The following are excerpts from the statement on the seamen's exemption made by Ralph Emerson, legislative representative of the National Maritime Union, in the hearings on the Fair Labor Standards Act before the Joint Congressional Committees (Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., pp. 544–549):

> The CHAIRMAN. Mr. Emerson, we have you listed as the legislative representative of the National Maritime Union.
>
> Mr. EMERSON. Yes, sir.
>
> The CHAIRMAN. All right, you may proceed.
>
> Mr. EMERSON. Mr. Chairman and gentlemen, my name is Ralph Emerson. I am the legislative representative of the National Maritime Union of America, comprising a membership of over 50,000 merchant seamen of the Atlantic and Gulf coasts.
>
> I am also appearing here on behalf of the American Radio Telegraphists Association.
>
> * * * * *
>
> While there is no doubt in our minds that the intent of the bill is to raise labor standards to a fair level, and while it is also the intent of this bill to raise those standards among workers in mills, factories, and other branches of industry

which could be classed as productive, we feel that in a general interpretation of the whole bill that the way has been left open for the proposed Labor Standards Board to have jurisdiction over those classes of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the jurisdiction of the Government machinery now set up to handle these problems.

* * * * *

Representative THOMAS. Does the Maritime Act attempt in any way to regulate hours and wages?

Mr. EMERSON. It is a small section of the act that refers to the Maritime Commission's jurisdiction over merchant seamen. This is from the Merchant Marine Act of 1936:

"The Commission is authorized and directed to investigate the employment and wage conditions in ocean-going shipping and, after making such investigation and after appropriate hearings to incorporate in the contracts authorized under titles VI and VII of this act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy."

Representative THOMAS. Thank you.

The CHAIRMAN. I did not quite get the recommendation with reference to that. Would your organization prefer to continue under the Maritime Commission rather than to be included in this law? Have your seamen any position on that?

Mr. EMERSON. The position is—some people might say we want our cake and we want to eat it at the same time because while we want to go along under the jurisdiction of the Maritime Commission we feel, however, if the Labor Standards Board established a higher standard, then we would like to get any benefits which might accrue from this, although we feel that the Maritime Commission is going to do a good job as regards the merchant marine.

Representative CONNERY. In other words, you want double protection.

Mr. EMERSON. This is simply a protective clause; yes, sir.

As this newly formed Maritime Commission has jurisdiction, at present, over seamen in regard to wages, working conditions, and manning scales on subsidized merchant ships, and as we have every faith in the ability and competency of the Commission to handle our affairs, we feel that for the present time that that jurisdiction should not be hampered or impaired by any legislation that would be conflicting. However, we do not care to isolate ourselves from any benefits which could be accrued by this bill. As it is only in the recent past that the seamen, through organized efforts, have managed to have their standards of wages and living conditions raised, we feel that on page 12, part 2, section 4, paragraph (c) that caution should be observed by this committee in giving the proposed board the power to lower labor standards so that in no case should those standards be lowered to an extent that would deprive us of the gains we have already made. In fact, the seamen feel that any revision of wage scales for the maritime workers for some time to

come should be upward as we have long been amongst that class of workers who were underpaid and overworked.

Now, I would like to say something in regard to the maximum workweek. Under the best of union conditions in the maritime industry as affecting the seamen it is impossible at the present time for us to work less than 56 hours a week. At sea we cannot stop work and just say, "Well, this is a holiday," because we have to keep on working at the rate of an 8-hour day, 7 days a week, and that certainly makes 56 hours, but with the minimum of even 40 hours I think satisfactory arrangement could be made whereby the other extra 16 hours could be considered as overtime, and with the wages of the maritime workers at the low standards, as they have always been, I do not think we would be getting any too much money in regard to wages, because we have always been underpaid.

As I say, it has only been recently, in the last year or two, that we have started to raise our standards. We still feel, as regards the seamen, that they are working under substandard labor conditions, because our wages certainly do not compare with the average mechanic or shore worker, up to now.

* * * * *

Now, on page 19, lines 14 to 17, inclusive, it states:

"Deductions for board, lodging, and other facilities furnished by the employer if the nature of the work is such that the employer is obliged to furnish and the employee to accept such facilities."

* * * * *

As I say, we are in a position where we have to accept board and lodging, and an interpretation of this clause here gives the employer in the maritime industry the right to deduct for board and lodging.

* * * *

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End